83-807

No. .....

IN THE

Supreme Court of the United States

October Term 1983

Carl Michael Siebert,

Petitioner

vs.

D.T. Baptist, District Director
of Internal Revenue Service, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in holding that plaintiff, in this Constitutional tort action, was required to disprove the Defendants' claim of qualified immunity in order to survive their motion for summary judgment?

2. Did the District Court err in finding that the Anti-Injunctive Act, 26 U.S.C. § 7421(a), which precluded an earlier action by plaintiff as a case with respect to Federal taxes, did not toll the statute of limitations on plaintiff's tort claim for malicious prosecution of a bad faith termination assessment against certain Internal Revenue officials?

3. Did the District Court err in holding that Plaintiff's claim for relief under 42 U.S. C. § 1985, 1986, based on a conspiracy

between Federal and State officials, did not state a claim for relief where only violations of Federal rights were alleged?

4. Did the District Court err in refusing to consider evidence of Defendants' tax assessment procedures, as detailed in their official Internal Revenue Manuals and sworn affidavits of former agents, on the issue of whether defendants should prevail on their qualified immunity defense?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

Page

Page

Regulations:

Rules:

OPINIONS BELOW

The Court of Appeals' opinions for the Fifth Circuit are cited at 594 F.2d 923 and 599 F.2d 723 (App. A & B). The Court of Appeals for the Eleventh Circuit did not write an opinion (App. J-I), rather it simply affirmed the District Court's opinions and orders. Those opinions and orders are herein attached and appendixed at App. D-I of this petition.

JURISDICTION

The Court of Appeals' affirmation bears the date of May 27, 1983. It was entered on that day. The present petitioner, Michael Seibert, hereinafter refered to as "Seibert", did apply for rehearing which was denied on August 11, 1983. Seibert invokes the jurisdiction of this Honorable Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, rules and regulations, the relevant parts of which are set forth in Appendixes hereto:

Art. III, § 2, U.S. CONST.;

Amend. V, U.S. CONST;

Amend. VI, U.S. CONST;

Amend. VIII, U.S. CONST.;

IR Manual Supplement of May 19, 1971, Sections 1, 2, 3, 4, 6;

IR Manual Document MT 4500-129 (9-15-71) paragraphs 4584.3, 4584.4, 4584.5, 4584.6, 4584.7, 4584.8, 4585.1, 4585.2, 4585.3;

26 U.S.C. §§ 6201, 6212, 6213, 6331, 6851, 6861, 7421;

28 U.S.C. §§ 1331, 2201, 2202;

42 U.S.C. §§ 1983, 1985, 1986;

Fed. R. Civ. P. Rules 26, 33, 34, 56.

NO. _____

IN THE

OCTOBER TERM, 1983

CARL MICHAEL SEIBERT,
Petitioner

v.

DWIGHT T. BAPTIST, et al.,
Respondants[1]

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Carl Michael Seibert, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed without opinion the decision of the United States District Court for the Northern District

[1] Frank Magill, Jr., Acting District Director; Lee Willingham, Revenue Officer; Frank McCammon, Criminal Intelligence Division of the Internal Revenue Service; and secreted party Agent Larry Hyatt if granted permission.

of Alabama.

Petitioner prays that this Court consolidate the proceedings in this case with that of *Elizabeth Jane Hall, v. United States, et al.*, No. 83-514, presently awaiting action on her petition for certiorari under facts identical to those in the instant case.

That upon review of the above proceedings this Honorable Court will reverse the judgment of the lower courts and remand the action to the District Court with directions that respondants are to bear the burden of proof on their claim to official qualified immunity, or in the alternative, if Seibert is to carry the burden of proof, then he respectfully requests that he be allowed discovery by interrogatories and request for admission presently on record, that petitioner's claim is timely under the applicable statute of limitations and, that petitioner's claim based on conspiracy to

violate federal law, states claim for refief under Title 42 U.S.C. § 1985, 1986.

STATEMENT OF THE CASE

On July 7, 1972, plaintiff Carl Michael Seibert was arrested by Huntsville City Police for being in possession of a controlled substance. At the time of his arrest he was driving a car bought for his use, but owned by his father. During a search of the car, the police found in the front part, a controlled substance which was later proven to have been planted there by paid informer, Steve Beshears.[1] In the trunk were the plaintiff's Martin D-35 guitar, an overnight bag with a change of clothes, and $460.00. While searching his parents' residence, the police found $2,262.01 in cash and some additional foreign currency which they stated they were taking for evidence. The plaintiff's father

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[1] Affidavit of Steve M. Beshears, paid informer for the Huntsville Police Department.

informed the officers that the bulk of the money was old bills that his son had saved for years, and included some silver certificates (twelve of which were consecutively numbered). After a discussion with the plaintiff's father concerning the foreign currency, the officers decided against taking it in.

Later that evening approximately 7:45 p.m., Randall Duck of the Huntsville Police Department made a phone call to waiting IRS agents. The agents arrived at the residence as the plaintiff was being taken away, at about 8:00 p.m.

The IRS agents then proceeded to question Seibert's parents about him and the aforementioned property being seized. They also asked for, and received, information concerning the location of the plaintiff's bank account, but were told that it was just a small checking account which he used to buy school books.

On Monday, July 10, 1972, at about 7:30 a.m., Randall Duck and two IRS agents came to see Seibert while he was incarcerated. The agents handed him "notice of seizure" which listed the property being seized under the authority of 26 U.S.C, § 6331. They further informed him that the seizures included all rights to property. Seibert was handed a termination of taxable year, pursuant to 26 U.S.C. § 6851, which set his taxes at $6,458.00 for the period of January 1, 1972 to July 7, 1972. As required by the termination letter under Section 443 of Title 26, Seibert filed the Form 1040, stating that he had no income for the period of time in question.

The automobile which the IRS agents seized was owned and paid for by Seibert's father, but was purchased for Seibert's use. Seibert and his father made numerous visits with IRS agents in attempt to prove that the

automobile seized had been in a bailee-bailor relationship, Seibert being bailee. They presented many checks and documents relating to the automobile, and Seibert offered to sign a release as to his property interest. In fact, the IRS subpoenaed State Farm Insurance records. The offers made by the Seiberts were refused by the IRS agents.

In early August of 1972, Seibert received a phone call from Veronica (Ronnie) Potter, whom he had dated in 1970 and 1971. She had heard through mutual friends about his arrest and IRS seizures. He told her that one of the seizures was of the Martin D-35 guitar that she had given him as a gift. After expressing sympathy with Seibert's plight, Ms. Potter hung up. Later that same month, Seibert received a letter from her explaining that she had gone to the IRS and, claiming ownership of the guitar, they had turned it over to her, and she intended to

either keep it or sell it. In fact, however, the Martin D-35 had been registered in Seibert's name since early 1971 at Martin and Company under the serial #269211.

Shortly thereafter Seibert contacted the IRS agents assigned to his case about the guitar. They told him 'it was his problem if he couldn't keep his love life straight, and as far as the IRS was concerned it was a matter between Ms. Potter and himself.

On or about October 12, 1972, Seibert and his father received notice of auction which was to take place on October 26, 1972. On October 19, 1972, they filed an action to compel an explanation as to how the tax was computed as the basis for seizure. They accused the Director's actions as being without foundation or cause and Seibert claimed violation of the United States Constitution 's Fifth Amendment.

The U.S. Attorney opposed the action by Seibert on the basis of 26 U.S.C. § 7421(a) and further requested the court dismiss Carl Michael Seibert and his claims in the action, and to hear only the issue of the ownership of the automobile raised by Carl Edward Seibert (plaintiff's father). The Government further requested that a bond be posted on the automobile. The trial court followed the Government's request and allowed only the issue on the automobile to stand.

After the death of Carl Edward Seibert, executrix Mary Constance Seibert was substituted as plaintiff in that civil action. On November 19, 1973, United States District Court Judge Seyborn Lynn, by preponderence of evidence ruled for Mrs. Mary C. Seibert. The collection department of IRS continued to write or call Seibert weekly about paying the alleged tax. Seibert continued trying to convince different

branches and agents to examine evidence compiled to prove his innocence, but they would not turn the first page. His efforts included visits to the Criminal Intelligence Division of IRS with information about illegal income of persons involved in entrapment of others to cover their own actions and the income made therefrom. He sent affidavits to the Director of IRS stating that, under penalty of perjury, he had not been in the business of selling drugs or narcotics. He filed amended returns and wrote for conferences in which agent Robert Jones refused to receive or examine any of the evidence offered by Seibert, however, he stated that if the plaintiff would admit to the right amount of drugs he sold, they might reduce his tax liability.

On August 9, 1974, Seibert received his 90-day letter, or Notice of Deficiency (some 25 months after the jeopardy assessment seizure)

and, on a contingency agreement, hired counsel to file his petition in tax court which requested the return of the U.S. Currency and currency collection, bank account and Martin D-35 guitar. The case was assigned No. 8724-74.

On January 23, 1975, in an appellate conference, with Seibert and his attorney Charles Ray present, the regional counsel and an appellate agent, Herb Law, stated they would review some evidence. Seibert gave them some transcripts and was tiven a receipt, as he requested.

Then teh case which was set for October 20, 1975, was pulled off the docket by the regional counsel. Seibert's counsel told him the amount of money involved was not worth the time and expense of recovery. Seibert paid the counsel with money borrowed from his mother, Mary C. Seibert. He then wrote the tax courts and had the case redocketed.

After the case was pulled from trial

status by regional counsel, Bob West, but before the request for redocketing, the plaintiff, through his attorney, Phil Geddes, requested a review of his file through the Freedom of Information Act. After receiving a standardized letter in which the IRS requested additional time to comply, Mr. Geddes received a request for power of attorney, and then, finally, a third letter was received which stated that they were unable to locate the file or the requested information. Assuming he could rely upon this information given by the IRS, Mr. Geddes naturally believed there could be no appeal, but some five years later the plaintiff discovered it had been wrongfully and intentionally withheld.

The plaintiff succeeded in having his case redocketed in Tax Court, but upon realization of a trial, the IRS counsel withdrew their claim of a deficiency and argued that the Court

lacked jurisdiction. Upon a stipulation of the parties, and the claim by the Tax Court that it lacked jurisdiction on the issues other than the plaintiff's alleged 'tax liability', the order on this case was simply to allow the dropping of the assessment which would allow the Federal District Court to have jurisdiction against a renewed claim to bar teh action under the Anti-Injunctive Act. Tax Court Judge William Quealy told the plaintiff and his counsel that the IRS wished to drop their assessment and that the Tax Court lost its jurisdiction on that basis. When plaintiff inquired into the effect of any statute of limitations, Judge Quealy told them that "the statute of limitations would start to run from the date of the Tax Court decision which would end the Commissioner's claim against Mr. Seibert."

The decision and stipulation were agreed

upon and on January 17, 1977, were filed with the Tax Court.

Warren E. Mason, Attorney at Law, told Seibert that this case would be too costly to litigate and it would involve years of effort, even if he were successful in getting the case to the jury.

Seibert filed his Complaint in the United States District Court for the Northern District of Alabama against the following Federal agents of the Internal Revenue Service in their own individual capacities: D.T. Baptist, Columbus Sanders, Frank W. McCammon, Lee Willingham and Frank Magill, Jr. and against persons, firms, or corporations whose names are unknown to the plaintiff but will be added by amendment as soon as ascertainment of same is made.

Seibert invoked jurisdiction in the District Court under Sections 1331, 1343, 2201, and 2202 of Title 28; Sections 1983, 1985, and

1986 of Title 42; and the Amendments to the United States Constitution.

Seibert alleged violations of, and conspiracies to violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Seibert later filed an Amended Complaint and, for clarification, filed an Amendment to the Complaint. Seibert was unable to determine the address of Steven Beshears or place upon which service could be made.

Prior to the defendants' motion to dismiss, or in the alternative motion for summary judgment, being granted, there were some thirty-four pleadings filed, which included interrogatories and requests for production of documents, all of which were denied. On August 11, 1978, the District Court granted the Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Seibert gave

notice of appeal along with a motion for appointment of counsel or alternative counsel in an advisory capacity which were filed on September 5, 1978. On the 6th day of September, 1978, the Motion for Appointment of Counsel or Alternative Counsel was denied.

The appeal was taken and Seibert's Appellant Brief was filed on November 19, 1978.

On May 3, 1979, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's Opinion of August 11, 1978. Then on Petition for Rehearing, filed on May 22, 1979, the Court below reversed on what may have been only the Fifth Amendment jurisdiction on the basis of *Davis v. Passman*, 99 S.Ct. 2264, 60 L.Ed.2d 1979. Appellees Petition for Rehearing was filed on August 27, 1979, but was denied on September 21, 1979 on the

defendants' immunity. Seibert also petitioned, but it was denied. Seibert then petitioned the United Supreme Court for petition for writ of certiorary, which was opposed by the Solicitor General as premature. On June 16, 1980 the petition was denied.

On remand to the District Court, Judge Propst entered numerous orders, barring discovery by plaintiff's Interrogatories, Request for Admissions of Fact and Production of Certain requested IRS Documents and Specific Numbered Internal Revenue Manuals. However, the court required the case to be tried against the "least culpable" ofthe defendants. It found as a matter of fact that there was not any improper IRS program involving the IRS agents. When Seibert offered proof from the Special Agent Thomas S. McWhorter that, in fact, Seibert had been one of those targeted fro the program, the district court excluded that

evidence from jury (Transcript 179-196).

On March 22, 1982 the court dismissed Seibert's case against all the respondents.

An appeal was timely taken and on May 27, 1983, the Eleventh Circuit Court of Appeals affirmed with no opinion. The petition for rehearing was denied on August 1983.

REASONS FOR GRANTING THE WRIT

1. *The District Court erred in holding that plaintiffs, in this Constitutional Tort action, was required to disprove the Defendants' claim of qualified immunity in order to survive their motion for summary judgment.*

Recent developments in the law of qualified immunity now make it necessary to resolve an issue upon which the various circuits are divided. This Court's decision in *Butz v. Economou, infra,* and *Harlow v. Fitzgerald, infra,* advocating the use of summary judgment procedure in resolving claims of qualified immunity in a *Bivens* type action, makes it imperitive that the Court address the issue of which party bears the burden of proof under the qualified immunity defense.

In *Butz v. Economou,* 438 U.S. 478, 507-508, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978) this Court

admonished the circuits that official "good faith" qualified immunity was a proper subject for summary judgment in 42 U.S.C. § 1983 and Constitutional Torts actions. The subjective prong of the defense as it had developed since *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975), requiring as it did an inquiry into the defendant officials' state of mind, had proven unwieldly for summary judgment practice. Therefore the Court in *Harlow v. Fitzgerald*, 457 U.S. ____, 73 L.Ed. 2d 396, 411, 102 S.Ct. 2727 (1982) abandoned the subjective prong and adopted an essentially objective test of good faith. *Harlow's* most significant posture however was its sweeping prohibition against all discovery pending resolution of the qualified immunity issue. In those circuits which place upon the plaintiff the burden of disproving the plea of qualified immunity, the denial of all discovery

substantially increases the burden he must carry. See *Herbert v. Lando*, 441, U.S. 153, 169, 60 L.Ed. 115, 129, 99 S.Ct. 1635 (1979).

Previous decisions by this Court have been equivocal with regards to which party carries the burden of proof on the defense. *Scheuer v. Rhodes*, 416 U.S. 232, 249-250, 40 L.Ed.2d 90, 104, 94 S.Ct. 1683 (1974) reversed the trial court for granting the defendants' motion to dismiss on the qualified immunity defense where no evidence warranting a finding of good faith had been introduced. However, the courts subsequent decision in *Procunier v. Navarette*, 434 U.S. 555, 565-566, 55 L.Ed.2d 24, 33, 98 S.Ct. 855 (1978) reinstated a summary judgment for defendant officials claiming qualified immunity although no evidence was introduced that the officials acted in good faith or had not violated a 'clearly established' constitutional right.

More recently the Court in *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980) directly held that the burden of pleading the qualified immunity defense was on the official claiming the affirmative defense. Although the Court's rationale for placing the burden of pleading on the defendant would argue forcefully for placing the burden of proof on the defendant as well, Justice Powell in his footnote 24 to the *Harlow* opinion specifically stated that the burden of proof question was still unresolved. *Harlow*, 73 L.Ed.2d 396 at 408.

The ambiguity of the Court on this matter is reflected in the decisions of the circuits. The District Court below applied the 'shifting burden' approach which is presently in general use throughout the Fifth Circuit. That approach set out in the case of *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981) and relied on by

the Court below states:

> "Once the official has shown that he was acting in his official capacity and within the scope of his discretionary authority, the burden shifts to the plaintiff to breach the officials immunity by showing that the official lacked 'good faith'." 651 F.2d at 1121.

Decisions of the Fifth and Eleventh Circuits after *Harlow* indicate that the plaintiff will retain the burden notwithstanding the demise of the subjective prong of the immunity defense. See *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982), and see *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982) (citing *Barker*). This position however is at variance with that taken by the First, Fourth, Sixth and Ninth Circuits which uniformly placed the burden of proving the defense squarely on the defendant.[1]

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[1] *Saldana v. Garza*, 684 F.2d at 1163, footnote 14. "... while the Fifth Circuit rule has not enjoyed universal

Moreover, *Harlow* has equally assured the Sixth Circuit that the burden lies with the defendant:

> "an assertion of qualified immunity is an affirmative defense which must be pleaded and proved by the defendant official . . . This conclusion is buttressed by the Supreme Court's recent decision in *Harlow v. Fitzgerald* (citations ommited) . . . When discussing how the new standard whould be applied, however, the Court inferred that the burden of proving the qualified immunity defense should be on the defendant official."
> 706 F.2d 751, 754 (6th Cir. 1983)

The decision of the District Court in the instant case to grant summary judgment for the

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acceptance, see e.g. *Haislah v. Walton*, 676 F.2d 208, 214-215 (6th Cir. 1982)(defendant bears burden of showing that they have acted in good faith); *Wolfel v. Sanborn*, 666 F.2d 1005, 1007 (6th Cir. 1982)(burden on defendant); *Harris v. Roseburg, et al.*, 664 F.2d 1121, 1127 (9th Cir. 1981)(burden on defendant); *Logan v. Shealey*, 660 F.2d 1007, 1014 (4th Cir. 1981) (burden on defendant), this panel is bound by the rule that places the burden of breaching an asserted immunity upon the plaintiff."

several defendants on the grounds that plaintiff had not met his burden of rebutting their claim of qualified immunity, presents this Court with an opportunity to resolve the conflict on this issue. Resolution of this issue by placing the burden of proof of the qualified immunity defense on the defendant will tie together conceptually the objective framework for good faith immunity begun in the *Harlow* case.

The importance of the problem of allocation, burden and the degree of proof in addressing summary judgment taken pursuant to Federal Rules of Civil Procedure, Rule 56b & c are exemplified by the instant case and *Hall v. United States*, No. 83-514. If, as stated above, the burden of proof is allocated to Federal or State defendants, it must be assumed that if there is damaging information under their exclusive dominion and control, it will be made available to the reviewing court.

However, it is questionable whether defendants would produce inculpatory information. See *Poller v. Columbia Broadcasting System*, 82 S.Ct. 486, 491, 368 U.S. 464, 473 (1962); *Hobson v. Wilson*, 556 F.Supp. 1157, 1178 (D.D.C. 1982) and *Seibert v. D.T. Baptist*, No. 77-PT-0951 (N.E.D. Ala. 1982). If the plaintiff is to carry the burden of proof, then he or she should be allowed to complete discovery of the probative material with the assistance of the court if unreasonably resisted by defendants or their Government counsel. In the instant cases the burden was placed on Seibert and Hall as plaintiffs, however the most important and probative part of Seibert's discovery (request for admissions and interrogatories promulgated upon Internal Revenue Manuals) was barred by the District Court.

The significance of these Internal Revenue Manuals as they relate to intentional violations

by defendant Federal officials and misrepresentations to this Court by those defendants' counsel cannot be overstated. Several court rulings were based upon misrepresentations by Government counsel, in particular, decisions relating to the Notice of Deficiency. However, Internal Revenue Manuals, unavailable to the court at that time, made it clear that Notice of Deficiency was required within 60 days from the date of the assessment.

INTERNAL REVENUE MANUAL 4500-129 (9-15-71) 4584.8, Immediate Revnew and Issuance of 90-Day Letters, provides in pertinent part, that:

> (1) *Immediately after assessment*, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. *It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.* (emphasis added)

Section 4585.1, paragraph (2) of the Internal Revenue Manual states, in pertinent part, that:

> ". . . the review procedures in IR Manual 4584.8 relating to jeoparty assessments apply also to assessments under I.R.C. 6851 . . ." (App. O, o-11)

Internal Revenue Manual 4585.1(2), when read in conjunction with IR Manual 4584.8(1) makes it clear that the statutory Notice of Deficiency (90-day letter) was to be issued "within 60 days from the date of assessment."

The respondents and their Government counsels point to IR Manual 4585.3 in their endeavor to mislead the unweary. However, the reader who is armed with IR Manual 4584.8 and the Internal Revenue Code will discover that IRM 4585.3 which states that no statutory notice of deficiency will be issued for the short period simply refers to the 10-day period (short period) of I.R.C. 6331 which is only the "waiver" or elimination of the 10-day statutory notice requirement of I.R.C. 6331 before seizure of

property when under I.R.C. 6851 or 6861 jeopardy-termination assessment.

The Government counsel may express their absence of knowledge during the case of *Laing v. United States*, 423 U.S. 161, 96 S.Ct. 473 and 46 L.Ed.2d 416 (1976) as to the existence of the IR Manuals which required the same due process in both I.R.C. 6851 and 6861 (e.g. Notice of Deficiency was required within 60 days of the assessment). However, it is clear they cannot claim they were ignorant of that fact in *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983). In *Hall, id.*, the same Department of Justice, Tax Division, counsels which were involved in *Seibert v. D.T. Baptist*, induced the 6th Circuit to rule that the IRS agents lacked knowledge of Notice of Deficiency requirements by IR Manuals until *Laing, supra.* (See *Elizabeth Jane Hall, Petitioner, v. United States, Thomas P. McHugh and Elmer B. Snider,*

Respondents, No. 83-514, Motion to Defer Ruling and to Consolidate, Exhibit A.

Whether via mistake or fraud, the respondants prevailed by virtue of their superior adversary position and the courts reliance thereon. There can be little question that in light of the granting of two protective orders in the case at bar and the court's blocking answers to very important interrogatories and request for admission, that there is a great necessity for clarification to the degree and allocation of the burden of proof. It is clear from the IR Manuals 4584.8 and 4585.1(2) that fundamental due process would have required the availability of a reasonably prompt access to a hearing before a taxpayer was deprived of his property for a period of many years as was Seibert.

The instant case exemplifies the damage that a bar of discovery against relevant

can do to a case where the burden of proof is placed on the plaintiff to disprove general good faith claims of official defendants. If the plaintiffs and the courts rely on Government counsels and government officials *ex mero motu* to produce inculpatory evidence, there is a great probability that a plaintiff in a constitutional tort case will never survive a defendant's motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56.

For the above stated reasons, this Honorable Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to allow us to further develop this fundamental and important question of federal law, the allocation of and the degree of burden of proof.

2. *The District Court erred in finding that the Anti-Injunctive Act, 26 U.S.C. § 7421(a), which precluded an earlier action by plaintiff, did not toll the statute of limitations on plaintiff's tort claim for malicious prosecution of a bad faith termination assessment against certain Internal Revenue Service officials.*

While the finality of the court below's judgment on statute of limitations is unclear by virtue of its refusal to certify for interlocutory appeal, it nonetheless implies that Seibert was barred by a one-year statute of limitations from bringing any lawsuit against Federal tax officials and that the original complaint was not timely filed. (App. D, d-19) However, denials of the majority of Seibert's motions were based on statute of limitations while the court below granted respondants'

protective order barring discovery of probative information exclusively under control of the defendants on the same grounds. Further, the District Court placed the burden of proof on Seibert to prove the defendants knowingly violated a constitutionally protected interest.

Plaintiff produced additional affidavits of IRS Agents Dudley M. Weathers and James Pertree which attested to the unreasonableness of the amount and the termination assessment. The affidavit of IRS Agent Pertree also attested to the program which seized terminated taxpayer's assets for purpose of interferring with their ability to retain "expensive counsel" and to make bond. As a result of those IRS Agents' affidavits, on March 22, 1982, the court below adopted its view on statute of limitations. Consequently, Seibert is compelled to address the issue.

The gravamen of Seibert's complaint, as

characterized by Judge Sam Pointer is that of a malicious prosecution and harassment case via the initiation and continuation of a bad faith termination-jeopardy assessment made pursuant to 26 U.S.C. § 6851 (App. A, a-1). Judge Propst remarked,

> "The court is, quite frankly, surprised that this case could be pending at this point without a resolution of the statute of limitations issue; and the court is of the opinion that the issue may well be determinative of the case." (App. D, d-23).

Judge Propst's finding that the statute of limitations issue had not been addressed was simply in error.

The issue of statute of limitations arose during the pendency of defendants' Motions and Supplemental Motions to Dismiss, or In the Alternative, Motion for Summary Judgment, filed September 26, 1977, and both parties had written to that issue. (See Supplemental Record, No. 78-3007, Plaintiff's Supplemental Brief, Argument and Memorandum of Law in Opposition

to Defendants' Motion to Dismiss @p.3, filed April 12, 1978). Further, oral argument was granted and from the bench, Judge Pointer told the parties that the statute of limitations was not dispositive of jurisdiction or the case and for the parties not to waste their time or the court's time by arguing that point. He stated two grounds for that ruling: 1) that Mr. Seibert's complaint is couched in the language of a malicious prosecution, and; 2) that plaintiff filed an action earlier to invoke the jurisdiction of the court, and the issue of an earlier filing had been collaterally decided by *Seibert v. Baptist*, CA No. 72-936-NE (N.D. Ala. 1972). In granting the defendants' Motion to Dismiss/Alternative Summary Judgment on August 11, 1978, Judge Pointer added one additional reason why this specific action could not be filed. He determined that this is a case "with respect to Federal taxes." (App. A, a-

Consequently, if a lawsuit is a case "with respect to Federal taxes," plaintiff may not acquire jurisdiction through 28 U.S.C. § 2201, 2202. Additionally, if the plaintiff has outstanding "tax liability" and the court determined that the plaintiff did not come under the exception of 26 U.S.C. § 7421, et seq., as was the case in *Seibert v. Baptist, et al, supra*, the Federal Court would lack jurisdiction.

Judge Propst reaffirmed Judge Pointer in his holding that the instant case is one "with respect to Federal taxes," but ruled that the lawsuit was barred by the Alabama one-year statute of limitation because the suit was not filed before the resolution of the "tax liability" Such a ruling is absolutely inconsistent with the facts, legal history, evidence and both Federal and Alabama law. When Seibert resolved the "tax liability" in his favor, it removed the claim of tax liability, and with it, the

bar against jurisdiction imposed by the Anti-Injunctive Act in Federal Court. Within 6 months of the removal of burden imposed by IRC § 7421, this action was again filed.

Alabama, as many other states, requires that a plaintiff who is alleging malicious prosecution or malicious abuse of process, as in the case at bar, must first prevail in the action upon which he has stated was wrondfully taken. In *Hudson v. Chancey*, 385 So.2d 61 (Civ. App. 1980), the court dismissed even a counterclaim of malicious prosecution for lack of maturity when defendant had not prevailed. See also *Kroger Co. v. Puckett*, 351 So.2d 582 (Civ. App. 1977); *Brown & Rood, Int. v. Big Rock Corporation*, 383 F.2d 662, 665 (5th Cir. 1969) which states:

> "No cause of action for malicious prosecution comes into existence until the termination of the particular judicial proceeding which is the gravamen of the malicious prosecution action."

While the law of Alabama, as it relates to malicious prosecution, barred the filing of this action any earlier for want of maturity, this case was burdened with another problem unique to constitutional violations or malicious prosecution/abuse of process claims: abuse of process claims arising out of the assessment and collection of tax are barred by the Anti-Injunctive Act of I.R.C. 7421(a) and its counterpart 28 U.S.C. § 2201 and 2202 until the tax liability is cleared. This prohibition against Federal Court jurisdiction while there is alleged (as in Seibert's case) or potential tax liability flows even to actions which claim violations of United States Constitutionally protected interest (as in the instant case). *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Alexander v. Americans United, Inc.*, 416 U.S. 752 (1974); *Black v. United States*, 534 F.2d 524 (2nd 1976).

While it is true that I.R.C. § 7421(a) can preclude suits for Constitutional violations and damages for present activities of IRS agents during the pendency of an alleged outstanding tax liability, the "Anti-Injunctive Act" was never intended to be a bar against review of past wrongful conduct in the form of a *Bivens* action. In *Graham v. United States*, 528 F.Supp. 933, 938 (E.D. Penn. 1981), the district court distinguished between the "present and future activities" and past activities as they apply to the Tax Anti-Injunctive Act. In rejecting the defendant's argument that the "Tax Anti-Injunctive Act bars the award of damages for tax-assessment activities" the court held that:

> "if a taxpayer utilizes those (tax review) proceedings and prevails, for instance, if he is acquitted in a criminal prosecution by showing bad-faith Fourth Amendment violation, nothing in the Act prevents a later damage action." *id.* n.7.

> "In addition (to the good faith qualified immunity defense), if taxpayer did not prevail at the earlier proceedings, the officials could seek to take advantage of the doctrines of *res judicata* and *collateral estoppel*. Accordingly, I hold that the Tax Anti-Injunctive Act does not require dismissal of damage claims arising from past activities." *id.* @ 938.

Analogizing the bar of the Anti-Injunctive Act to that of malicious prosecution is judicially economical as it would be in harmony with the intent of the Anti-Injunctive Act while providing redress if the taxpayer later prevailed if the tax assessment was in bad faith. To hold otherwise is to require superfluous litigation in an attempt to toll the statute of limitations. Equitable tolling, limits superfluous litigation. *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968); *Morris v. Houg*, 495 F.Supp. 797 (D.C.W.D. 1980). A contrary ruling would afford a constitutional tort remedy only to those taxpayers who have the wealth to satisfy

an alleged tax assessment within statutory limitations, while those who were required to first exhaust their tax court review would be without a remedy at its conclusion. An economic bar which ultimately deprives an individual a remedy is not consistent with due process . . . a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

The issue addressed above is an important one. As stated, a taxpayer who is wrongfully excluded from review by the Federal District Court will ultimately be denied a remedy at the conclusion of the United States Tax Court review and the only determinative factors will be the taxpayer's economic condition versus the amount of the assessment. Additionally, allowing the court below's ruling to stand is

to require an aggreived taxpayer to continually endeavor to usurp the Anti-Injunctive Act in an attempt to preserve a remedy by filing superfluous litigation.

3. *The District Court erred in holding that plaintiff's claim for relief under 42 U.S.C. § 1985 and 1986 based on a conspiracy between Federal and State officials, did not state a claim for relief where only violations of Federal rights were alleged.*

In the instant case the allegation against the respondants is that while in concert with local officials they conspired with them to maliciously prosecute a tax case for reasons other than a good faith interest in revenue and to insure the continuation of the prosecution by withholding procedural due process

and thereby prevent subsequent review. While this Honorable Court has theoretically removed the distinction between the immunity enjoyed by State and Federal officials in *Butz v. Economou*, 98 S.Ct. 2894, 438 U.S. 489 (1978), the treatment by the Federal Courts are nonetheless different. Federal Officials enjoy a much greater success rate in summary judgments than their State or Local counterparts. Examples are *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983) versus *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983) and *Seibert v. D.T. Baptist, District Director of Internal Revenue Service*, ____ F.Supp. ____ (N.D. Ala. 1982), appeal docket, No. 82-7163 (11th Cir. May 27, 1983), rehearing denied Aug. 11, 1983; versus *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982). The many cases in which Federal Courts have treated Constitutional Tort claims as an interference with government,

while the same court treats the same kind of a claim under 42 U.S.C. § 1983 et seq. with an eye toward doing substantial justice are too lengthy to list.

Consequently, Federal Courts regard 42 U.S.C. § 1985 & 1986 with greater respect as a remedy for redress of conspiracies to violate constitutionally protected rights. As a result, the *Bivens* action in many law review articles has earned the reputation of being the "hollow remedy of *Bivens*."

Contrary to the lower courts holding, there is no requirement that an alleged conspiracy occur under color of State law. This Honorable Court held in *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971), no "State action" is required in actions brought by black petitioner in the protection of life, liberty and property.

In *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), the court held an actionable private

conspiracy need not be based on racial discrimination, and in *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (1975), the presence or absence of state is not a factor.

In *Hobson v. Wilson*, 556 F.Supp. 1157, 1166-1167 (D.D.C. 1982) the court distinguished actions taken under 42 U.S.C. § 1983 from those taken under 42 U.S.C. § 1985:

> ". . . conspiracies that are actionable under 42 U.S.C. § 1985(3) exist whether or not the participants act under color of any official authority."

The courts below erred in their determination that conspiracies by Federal IRS agents were required to be taken under color of state law before Seibert could invoke jurisdiction for alleged conspiracies. The "state action" requirement for Federal Court jurisdiction under 42 U.S.C. § 1985 & 1986 is clearly erroneous and should be reversed by this Honorable Court.

4. *The District Court erred in refusing to consider evidence of Defendants' tax assessment procedures as detailed in their official Internal Revenue Manuals and sworn affidavits of former Agents on the issue of whether Defendants should prevail on their qualified immunity defense.*

The Federal Court of Appeals for the Eleventh Circuit has so far sanctioned such a departure by the District Court of the Northern District of Alabama as call for an exercise of this Court's power of supervision; specifically the court's complete disregard of the disputes of material facts and the evidence offered by Seibert. The fuling of the District Court is completely contrary to both the spirit and the purpose of Rule 56(b)(c) of the Federal Rules of Civil Procedure.

The gravamen of Seibert's complaint has been consistent: during the pertinent period the Internal Revenue Service operated under an illegal program that was intended to undermine the constitutional rights of certain class of persons of which Seibert was believed to be a member. In the case below Seibert was the object of the unlawful program and has consistently for the last ten years been attempting to develop the necessary facts to support his claims and to seek vindication of them.

Seibert alledges that he was maliciously prosecured by means of a bad faith assessment under a "program" which was intended to seize all assets and precluded review by withholding the statutory review procedure (e.g. the intentional withholding of the Notice of Deficiency). The Internal Revenue Manual governing the procedure in July of 1972 for the termination assessment of Seibert's taxable year is cited

at IRM 4585.2(1). (App. O, o-11)

The assessment made against Seibert was more than twice the amount at which the Internal Revenue Service valued his assets. Further, the defendants refused to offer "other facts" to explain their apparent disregard of the IR Manual's standard for reasonableness, and when interrogatories promulgated upon the respondents' compliance therewith, they moved for protective order.

In the affidavit of retired IRS Audit Agent James Pertree, he shows that even under the standard for setting assessments in the illegal program, Seibert's assessment was unreasonable. The standard referred to by Agent Petree was the practice of setting the assessment equal to the amount of money or other valuable property held by a person at the time of arrest. This practice is discussed in IR Manual Supplement, Termination of Taxable

Periods Under 6851, Section 2, Background (App. O, o-1). See also App. O, o-3 and App. O, o-10.

A majority of this information came after the depositions were taken. When Seibert attempted to challenge the general good faith claim with requests for admissions and interrogatories based on IR Manuals, the respondants moved to block discovery via protective order. As grounds they cited the court order of Aug. 4, 1981, of Absolute Immunity and Statute of Limitations. The court below, with apparent disregard for the problems Seibert had been having with perfecting any discovery of information about the IR Manuals and without requiring defendants to show any specific objections under Rule 33a of Fed. R. Civ. P., granted respondants' discovery prohibition pursuant to Fed. R. Civ. P., R. 26(1).

In *Washington v. Cameron*, 411 F.2d 705

(D.C. Cir. 1969) the court of appeals held that the court below erred when it refused to require superintendent of government hospital to answer interrogatories because it prevented plaintiff from formulating genuine issues of material fact. Moreover, *Harlow v. Fitzgerald*, 102 S.Ct. 2727, @ 2737 n. 26, noted that summary judgment shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material facts and that the moving party is entitled to a judgment as a matter of law. However, the court considering summary judgment is required to view the evidence in the light most favorable to plaintiff, or the party opposing the motion and where motive and intent play leading roles, the proof was largely in the hands of the alleged conspirators and hostile witnesses "the plot

thickens." *Poller v. Columbia Broadcasting System*, 825 S.Ct. 486, 491, 368 U.S. 464, 473 (1962). So long as there were disputes, summary judgment was improperly granted. C.F. *Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980), *Maclin v. Paulson*, 627 F.2d 83 (7th Cir. 1980), *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (1980), and further in *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), Circuit Judge Clark noted in reversing the District Court:

> "(f)inally, there is some question as to whether summary judgment may be an appropriate means of resolving a state of mind issue . . ."

However, even if the district court did not abuse its descretion by barring discovery as to inquiries about the specific "good faith" claimed by respondants, he erred by holding there was no program to abuse seizure powers of the IRS. Then for the District Court to

grant summary judgment to the most culpable of the respondants, then change the theory of the action in the last minute, and prohibit proof of the program which was the impetus for the improper assessment and seizure of property, is an abuse of judicial discretion. See retired IRS Agent Thomas McWhorter's proferred testimony @ TR 179-196.

The program's existence has caused the respondants to be evasive and be defensive with Seibert throughout the handling of his entire case. The "program" provides the motive to fabricate and conceal, as is exemplified in the instand case, and in *Hall v. United States*, 704 F.2d 246 (6th Cir. 1983) which is a decision, at a minimum, based on an unintentional misrepresentation.

The disputes of material issues are great.

The respondants could not have answered Seibert's interrogatories in light of IR Manuals and still have claimed "good faith" defense. The affidavits of IRS Agents Pertree, Weathers and McWhorter submitted by Seibert were so damaging to the respondants' defense that the bar of discovery was the only method to preserve even qualified immunity defense.

It would be impossible to expect of any plaintiff in a 42 U.S.C. § 1983 et seq. and/or *Bivens* action to produce a greater sufficiency of evidence than the intentional ignoring of defendants' own procedure and agents of the same agency attesting to the wrongful conduct of the defendants themselves. While factual in nature, Summary Judgment is a question of law, it can not be legally fairly stated that under the evidence, the respondants were as a mat of law, entitled to Summary Judgment.

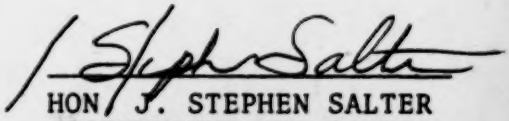
As stated above, there was such a departure

from established federal law that this Honorable Court should intervene.

CONCLUSION

For the reasons set forth above, Seibert submits that a writ of certiorari should be issued to review the opinion of the court below granting summary judgment and its affirmation by the Court of Appeals for the Eleventh Circuit on August 11, 1983.

November 9, 1983.



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APPENDIX A.

[594 F.2d 423]

Judgment and Opinion of the Court of Appeals.

In the United States Court of Appeals, for the Fifth Circuit.

Carl Michael SEIBERT, Plaintiff-Appellant, versus D. T. BAPTIST, District Director of Internal Revenue Service, et al., Defendant-Appellees. No. 78-3007, Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

(May 3, 1979).

Taxpayer sued internal revenue officials seeking monetary damages based on alleged abuse of authority in terminating plaintiff's taxable period and in failure to follow prescribed procedure in making jeopardy assessments of income tax deficiency, with complaint also alleging that defendants unlawfully seized plaintiff's property and denied him due process. The United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J., dismissed, and plaintiff appealed. The Court of Appeals, affirmed on basis of the district court's memorandum opinion holding that: (1) to extent that complaint was read to assert a claim against United States, it was barred by sovereign immunity; (2) declaratory judgment statute is not an independent basis of jurisdiction; (3) recovery could not be had under civil rights acts since defendants were federal officials acting under color of federal law, and (4) no right of action in damages was to be implied directly under the Fourth and Fifth Amendments.

Affirmed.

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Appeal from the United States District Court for the Northern District of Alabama.

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the Memorandum of Opinion of United States District Judge Sam C. Pointer, Jr., a copy of which is an appendix hereto.

SEIBERT v. BAPTIST

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

CARL MICHAEL SEIBERT	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CA 77 P 0951 NE
	)	
	)	
D. T. BAPTIST,	)	
DISTRICT DIRECTOR	)	
OF INTERNAL REVENUE,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF OPINION BACKGROUND

What can only be characterized as an unusual set of events has led to the defendants' motion to dismiss the plaintiff's complaint. It is this motion which is currently before the court. Since both parties have submitted memoranda and affidavits in support of their respective positions, the motion will be treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

On July 7, 1972, plaintiff Carl Michael Seibert was arrested by the Huntsville Police Department for possession of LSD. At the time of his arrest plaintiff was apparently driving his father's car. The Huntsville Police seized the car and its contents, which included a guitar and a currency collection.

On July 10, 1972, agents of the Internal Revenue Service served plaintiff with a Notice of Termination of Taxable Period pursuant to Section 6851 of the Internal Revenue Code[1] by which plaintiff's income tax liability for the period January 1, 1972, to July 7, 1972, was made immediately due and payable. Plaintiff was also served with a Notice of Seizure under I.R.C. Section 6331.[2] By this notice it was indicated that the car and its contents

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[1] 26 U.S.C.A. § 6851, as it was in force in 1972, reads in applicable part as follows:

> *If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, . . . the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated . . .*

[2] 26 U.S.C.A. § 6331. In applicable part, that section reads as follows:

> *"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10 day period provided in this section.*

previously impounded by the Huntsville police were being seized by the IRS in partial payment of tax deficiencies proposed against plaintiff in the amount of $6,458.00. Plaintiff was never given information about how the deficiency was computed.

At this point, it becomes difficult to determine just what events transpired, and in what order. According to plaintiff's amended complaint, on October 19, 1972, plaintiff and his father initiated suit in federal court to enjoin the IRS from selling the seized property at auction, and to compel an explanation of the basis for the seizure. That suit was dismissed by the district court as to all material issues on November 1, 1972.[3]

At some point during this sequence of events, defendants' memorandum in support of its motion to dismiss indicates that the termination assessment against plaintiff was abated and a notice of deficiency[4] was issued to the plaintiff.[5] In response to the notice, plaintiff filed a

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[3] *Seibert v. D. T. Baptist*, CA No. 72-936-NE (N.D.Ala.1972). The basis for the dismissal was apparently 26 U.S.C.A. § 7421(a) which provides in material part:

> "... [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom [the] tax was assessed."

See *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962).

[4] 26 U.S.C.A. § 6212 provides that a taxpayer be notified in the event any deficiency in taxes owed is declared against such taxpayer.

[5] A stipulation entered into between the plaintiff and the Internal Revenue Service pursuant to plaintiff's request for a redetermination of his deficiency indicates that the deficiency notice was mailed August 7, 1974. The exact reason for the lengthy delay between the original termination assessment and notice of deficiency is not clear.

petition for redetermination of his tax deficiency,[6] with the United States Tax Court. Upon a stipulation of the parties, the Tax court entered an order on January 17, 1977, to the effect that there had been an overpayment in income taxes by plaintiff for the 1972 tax year in the amount of $2,893.15.[7] By the terms of the stipulation incorporated into the Tax Court's order, plaintiff did not waive *"any rights he may now have to proceed against the Internal Revenue Service or any employee for damages or restitution on account of the seizure and release of certain personal property . . . "* It is this reservation of right which forms the basis of the present controversy.

THE PENDING LITIGATION

On July 11, 1977, plaintiff proceeding *pro se*, filed a complaint against the District Director of the Internal Revenue Service, four officals of the IRS, two Huntsville Policemen, and a Madison County Circuit Judge.[8] The

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[6]26 U.S.C.A. § 6213(a) allows a taxpayer, within 90 days after notice of deficiency, to file a petition with the Tax Court for a redetermination of the deficiency.

[7]*Seibert v. Commissioner of Internal Revenue*, No. 8724-74 (U.S.T.C. Jan. 17, 1977).

[8]Defendants Randall Duck and Gary Patterson, Huntsville Police Department officers, were dismissed as defendants by an order of this court dated October 4, 1977. Defendant, David R. Archer, a Madison County Circuit Judge, was determined to be insulated from liability by judicial immunity on November 10, 1977. *See Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Plaintiff failed to amend his complaint to state a cognizable claim against Archer within the 30 days granted by the court's order. Thus, the only remaining defendants are five officials of the Internal Revenue Service.

complaint, without alleging any statuatory basis for relief or grounds for jurisdiction of the court, sought recovery of property seized by the IRS, or compensation therefor. On defendent's motion, the court dismissed this complaint and granted the plaintiff thirty (30) days to amend the complaint to state a jurisdictional basis for the cause of action. Pursuant to this order, on January 3, 1978, plaintiff filed an amended complaint which the defendants' pending motion seeks to have dismissed.

By his amended complaint, the plaintiff alleged jurisdiction of this court pursuant to the fifth and fourteenth amendments to the United States Constitution, and under 28 U.S.C. §§ 2201-02, § 1331, § 1343, and 42 U.S.C. §§ 1983, 1985, and 1986. The gravamen of plaintiff's amended claim is that defendent IRS officials have abused their authority under 26 U.S.C.A. § 6851 to terminate plaintiff's taxable period, and that they did not follow the prescribed procedure under 26 U.S.C.A. § 6861[9] to make jeopardy assessments of income tax deficiency. Broadly read, plaintiff's complaint also alleges that the defendants subjected him to malicious prosecution and harassment, that they unlawfully seized his property, caused him and his family mental anguish, and denied him due process and the equal protection of the laws. In his prayer for relief plaintiff requests return of,

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[9]In material part, 26. U.S.C.A. § 6861 reads as follows:

> *"If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall notwithstanding the provisions of section 6213(a), immediately assess such deficiency . . . and notice and demand shall be made by the Secretary or his delegate for the payment thereof."*

or compensation for, all previously seized property,[10] as well as compensatory and punitive damages, costs, and attorney's fees.

JURISDICTION OF THE COURT

The district courts of the United States are courts, the jurisdiction of which is *"limited to those cases within Art. III, Sec. 2 of the Constitution over which an Act of Congress has given [them] jurisdiction."*[11] Serious questions are presented here with respect to whether this court has the authority to decide the potential merits of this case. Each of the jurisdictional allegations asserted by the plaintiff therefore requires close scrutiny.

CONSTRUCTION OF PLAINTIFF'S CLAIM AS ONE AGAINST THE SOVEREIGN

Defendents have devoted a substantial portion of their memorandum to the proposition that the plaintiff's claim,

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[10]As previously indicated, the seized property included an automobile, a guitar and a currency collection. According to defendants' memorandum, the car was released to plaintiff's father on a showing that he was its owner. The guitar, defendants state, was also released to a third person, Ms. Veronica Louise Potter, who demonstrated ownership of it. Plaintiff contends, however, that Ms. Potter had given the guitar to him as a gift, so that its release to her was improper. The final item seized was a sum of money which plaintiff claims was a currency collection of sequentially-numbered, uncirculated bills and silver certificates. Defendants' memorandum, however, suggest that when the money was seized there was nothing indicated by its appearance which distinguished it as a collection, and further, that a list of the serial numbers of the bills made at the time of the seizure indicated that none of them were sequentially numbered.

[11]*Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied* 336 U.S. 904, 69 S.Ct. 491, 93 L.Ed. 1069.

while nominally filed against officials of the Internal Revenue Service, is in actuality a suit against the United States as real party in interest. As such, defendants argue, plaintiff's claims are barred by the doctrine of sovereign immunity, by which the United States may not be sued without its consent.[12] Defendants also point out that while the Federal Tort Claims Act[13] swept aside a large portion of the government's immunity for the tortious conduct of its employees, the plaintiff may not seek recovery under the Act for a number of reasons. Most notable among these reasons asserted for the nonapplicability of the FTCA is the 28 U.S.C. § 2680(c) exclusion from the Act's provisions of "*[a]ny claim rising in respect of the assessment or collection of any tax...*"[14]

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[12]*See, e. g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *United States v. Alabama*, 313 U.S. 274, 281, 61 S.Ct. 1011, 85 L.Ed. 1327 (1941).

[13]By 28 U.S.C. § 1346(b), the district courts are given "*exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" Substantive provisions of the Tort Claims Act are found at 28 U.S.C. § 2671 *et seq.*

[14]28 U.S.C. § 2680(c). Other asserted justifications for the nonapplicability of the FTCA include plaintiff's apparent failure to exhaust administrative remedies as required by 28 U.S.C. § 2675(a), the 28 U.S.C. § 2680(a) exclusion from the Act of claims arising from the performance by a government official of discretionary duties, and, finally, the exclusion under 28 U.S.C. § 2401(b) of all claims not raised within the period of the Act's two-year statue of limitations.

[1] To the extent, then that the plaintiff's complaint is read to assert a claim against the United States, it would appear that this claim is barred by the doctrine of sovereign immunity, and the absence of any statutory exceptions for actions of the kind presented here. The court is of the opinion, however, that this determination does not dispose of the litigation. Presumably, defendants' sovereign immunity theories resulted from their expectation that the United States Supreme Court would clothe all federal executive department officials in the protection of absolute immunity from damages for injuries caused by their unconstitutional conduct. Had the Court adopted such an approach, the plaintiff's only possibility for recovery would have been against the United States. Contrary to defendants' expectations, however, in *Butz v. Economou*, — U.S. —, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court held that in suits for damages arising from unconstitutional action, federal executive officials are entitled only to the qualified immunity set out in *Scheuer v. Rhodes*.[15] This decision suggests the possibility of a claim by the plaintiff against the defendant officials in their individual capacities. The question whether such individual liability may in fact be imposed on the defendants requires consideration at this point.

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[15] 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1975). In *Scheuer*, the Court dealt with the degree of immunity to be accorded state executive officals from civil rights actions under 42 U.S.C. § 1983. There the Supreme Court held that such officials were entitled to a qualified immunity from damage liability for constitutional deprivations. The extent of this immunity was seen to depend upon factors including the "*scope of discretion and responsibilities of the office*," "*the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based*," and the "*reasonable grounds*" and "*good faith*" belief in light of such circumstances by the officials that their actions were appropriate. 416 U.S. at 247-48, 94 S.Ct at 1692.

JURISDICTION OF THE DISTRICT COURT OVER CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

As noted previously, by the amended complaint, plaintiff alleged jurisdiction of this court over his claims against the defendants under several statutory and constitutional provisions. It appears clear that the statutory bases are without merit, and can be considered without extensive discussion. The possibility, however, of a direct action under the fourth or fifth amendments, based on the court's general 28 U.S.C. § 1331 *"arising under"* jurisdiction[16] requires close scrutiny.

[2] The first statutory basis for jurisdiction asserted by the plaintiff is the declaratory judgment provision of 28 U.S.C. §§ 2201-02. That this statute alone will not support plaintiff's cause of action is apparent for two reasons. First, the declaratory judgment sections do not establish an independent basis for federal jurisdiction, but rather only establish a separate remedy available in cases where jurisdiction otherwise exists.[17] Secondly, even if the declaratory judgment provisions authorized federal jurisdiction independently of any other basis, 28 U.S.C. § 2201 by its terms specifically excludes the use of

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[16] 28 U.S.C. § 1331(a) provides as follows:

> *"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."*

[17] *See, e.g., Red Lobster Inns of America, Inc. v New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir. 1975); *Brown & Root, Inc. v. Big Rock Corporation*, 383 F.2d 662, 666 (5th Cir. 1967).

declaratory judgments *"with respect to Federal taxes."* Clearly, then, this court has no jurisdiction over plaintiff's claim by virtue of 28 U.S.C. § 2201-02.

The plaintiff also alleges that federal jurisdiction is conferred over the present controversy by 28 U.S.C. § 1343. This statute is the jurisdictional basis for suits under 42 U.S.C. §§ 1983 and 1985. These sections allow a plaintiff to redress the deprivation of civil rights by authorities who act under the color of state law or by those who conspire to deprive such rights. In addition to 42 U.S.C. §§ 1983 and 1985 plaintiff further alleges the applicability of 42 U.S.C. § 1986, under which a person may be held liable for damages if such person neglects to attempt to prevent a conspiracy to deprive constitutional rights as such conspiracy is defined in § 1985.

[3] A recent per curiam decision of the Fifth Circuit Court of Appeals disposes of this asserted basis for federal jurisdiction in a manner adverse to plaintiff's contention. In *Mack v. Alexander*, 575 F.2d 488 (5th Cir. 1978), the plaintiff filed suit against certain officials of the Internal Revenue Service based on the defendants' alleged violations of constitutional rights stemming from an IRS attempt to levy on a joint bank account held by plaintiff and another party. Federal jurisdiction was asserted under 28 U.S.C. § 1343 and 42 U.S.C. §§ 1983 and 1985. In upholding the district court's dismissal of the action, the Fifth Circuit spoke in language applicable to the controversy *sub judice:*

> *"Section 1343 places original jurisdiction in the district courts when there is a substantive claim for violation of 42 U.S.C. §§ 1983 and 1985. However, we agree with the district courts ruling that these statutes*

provide a remedy for deprivation of rights under color of state law and do not apply when the defendants are acting under color of federal law."

575 F.2d at 489 (citation omitted). In the present case, similarly, plaintiff's only claims are that the defendants abused their authority under the federal Internal Revenue Code.

The final basis for jurisdiction asserted by the plaintiff, and the one which is by far the most complex is the general federal question jurisdiction of 28 U.S.C. § 1331. This statute provides the jurisdictional basis for civil actions which arise under the Constitution, laws, or treaties of the United States. Since, as indicated previously, there is no statutory authorization for damage claims against IRS officials, a cause of action supportable under § 1331 would have to be one which arises under the Constitution of the United States. Plaintiff has made such an *"arising under"* claim by virtue of his allegation that he was denied the due process and equal protection guaranteed to him by the fifth amendment to the Constitution.[18] Further, while the defendants' memorandum denies that plaintiff has ever alleged any fourth amendment violations (Memorandum in Support of Motion to Dismiss at 14), the court concludes that the plaintiff's complaint can be read to allege an unreasonable seizure of his property. Whether or not such fourth and

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[18]Unlike the fourteenth amendment, the fifth amendment has no independent equal protection clause. However, the Supreme Court has held that the fifth amendment's due process clause *"prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'"* *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975), quoting *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

fifth amendments claims will support an action based on 28 U.S.C. § 1331 remains to be determined.

BIVENS, BUTZ, AND DAVIS V. PASSMAN

[4,5] As indicated previously, the Supreme Court's recent decision in *Butz v. Economou*[19] determined that federal executive officials are entitled only to a qualified immunity from suits for damages arising from their unconstitutional action. The Court was careful to point out, however, that not all allegations of deprivations of constitional rights can be made the basis for damage claims. Rather, "[u]*nless the complaint states a* ***compensable claim for relief under the Federal Constitution,*** *it should not survive a motion to dismiss.*"[20] To this date, the only previously-recognized "*compensable claim for relief under the Federal Constitution*" has come from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In that case, the Supreme Court held that a violation of the fourth amendment by federal narcotics officials gave rise to a cause of action for damages consequent upon the unconstitutional conduct, and based on the general federal question jurisdiction of the federal courts. While presented with an opportunity to do so, the Court in *Butz v. Economou* specifically refused to consider which, if any, other personal interests are protected by the Constitution.[21] Resolution of plaintiff's

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[19] — U.S. —, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978).

[20] *Id.* at —, 98 S.Ct. at 2911 (emphasis added).

[21] *Id.* at —, 98 S.Ct. 2894, n.8.

constitutional claims in the pending litigation then, depends upon *Bivens* itself, as well as on the Fifth Circuit's en banc decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978).

Davis v. Passman is an extremely important case from the standpoint of the matter *sub judice* for two reasons. First, based on an analysis of how the Supreme Court had implied the fourth amendment cause of action in *Bivens*, the Fifth Circuit determined that no corresponding constitutional cause of action existed under the fifth amendment for an allegedly discriminatory dismissal of the plaintiff by her employer, a former member of Congress. Secondly, and again based on its analysis of the Supreme Court's *Bivens* decison, the Fifth Circuit also suggested that not even all alleged violations of the fourth amendment will support the cause of action which *Bivens* implied. The consequences of this analysis in *Davis* will be seen to be dispositive of the remaining matters presented in the current litigation.

The *Davis* case tested the cause of action implied in *Bivens* from two standpoints. The first approach considered the action as implied not solely on constitutional authority, but rather from the constitutional protections of the fourth amendment, buttressed by analogy to statutorily-implied causes of action where Congress had created federal rights but had provided no corresponding federal remedy. Since the right to be secure from unreasonable searches and seizures was viewed as one of the most fundamental of federal rights, and since the exclusionary rule of *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) had proven to be a less than

satisfactory remedy, the damages cause of action was viewed as necessary to effectuate the amendment. The second approach, distinguished from that found to have been used by the Supreme Court in *Bivens*, was determined to be appropriate only in situations in which the Constitution compels the existence of a damages remedy to vindicate the rights asserted.

[6] Having found that the *Bivens cause of action evolved from both constitutional and statutory bases, the Fifth Circuit tested the propriety of implication of a fifth amendment cause of action under the principles of Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), *"the Supreme Court's most comprehensive treatment of implied statutory causes of action."*[22] In that case, the Supreme Court had listed four factors to be considered in the decision whether to imply a cause of action from a statutory right: (1) whether the provision asserted creates an especial right in the plaintiff; (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy; (3) whether implication of the remedy would be consistent with the purpose of the right asserted; and (4) whether the cause of action implied would be one appropriate for federal law.[23]

In light of these factors, the Fifth Circuit attached a great deal of significance in *Davis v. Passman* to the fact that congressional amendments of Title VII had consistently avoided inclusion of the federal government within the Civil Rights Act's definition of the term

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[22]571 F.2d at 796.

[23]*Id.* at 797, citing *Cort v. Ash*, U.S. at 78, 95 S.Ct. 2080

"*employer.*" Consequently, in *Davis*, the court determined that no federal common law cause of action was due to be implied under the fifth amendment for alleged employment discrimination by a former Member of Congress. Similarly, under the second prong of the two-prong test for implying causes of action, the court of appeals also held that a fifth amendment cause was not constitutionally compelled. This determinination was based on the realization that not all rights included within the breadth of due process demanded federal protection through a direct cause of action.

[7] While this discussion of *Davis v. Passman* has been somewhat lengthy, the court believes that such analysis is required since that decision is viewed as dispositive of the remaining issues in the current controversy. Fortunately, in applying *Davis* to the present facts, the same considerations will be relevant to the plaintitt's asserted implied causes of action under both the fourth and fifth amendments. For the reasons which appear below, the court has concluded that such causes of action are not to be implied in the present situation. Following the approach adopted in *Davis*, a brief analysis of the current controversy in light of the relevant factors from *Cort v. Ash*, for implying causes of action is required.

[8] The first factor to be considered is whether the constitutional provisions asserted — here the fourth and fifth amendments — create an especial right in the plaintiff. The Fifth Circuit approach to this "*especial right*" requires that the injury inflicted on the plaintiff must directly infringe upon a constitutional guarantee. As pointed out in *Davis*, however, due process encompasses virtually all civil liberties embodied by the Constitution.

As such, an allegation of the denial of due process does not appear to satisfy the requirement of direct infringement of a constitutional right. Similarly, while in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*.

The second factor required to be considered toward the implication of causes of action is whether congressional activity in the field indicates an intent to allow such a remedy, or at least not to deny the remedy. It is with this factor that the strongest reasons for not implying a cause of action under either the fourth or fifth amendments in the present case are found; for here, congressional indications that no such remedy is to be allowed are clearly evident. First, the Federal Tort Claims Act specifically excludes claim against the United States if they relate to the assessment or collection of taxes.[24] Second, as further indication of congressional intent that the assessment and collection of federal taxes are to be free from judicial intervention, section 7421(a) of the Internal Revenue Code[25] prohibits any suit to restrain the assessment or collection of taxes. Finally, the fact that alternative measures for the collecting of tax assessments

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[24] 28 U.S.C. § 2680(c).

[25] 26 U.S.C.A. § 7421(a).

are provided,[26] is indicative of further congressional intent that individual liability for Internal Revenue officials is not to be implied.

The third factor required to be considered in determining whether to imply a federal common law cause of action is whether implication of such a remedy would be consistent with the purpose of the constitutional right asserted. As noted in *Davis* the breadth of the fifth amendment due process clause indicates that implication of a damage remedy from its provisions would be judicially unmanageable.[27] Further, while the breadth of the fourth amendment is more limited, the extensive statutory regulation of Internal Revenue matters (regulation which was not existent to the same degree over narcotics officials in *Bivens*) suggests that implication of a private cause of action would be inconsistent with the statutory scheme enacted by Congress.

[9] The final factor to be considered under *Cort v. Ash* is whether the implied action would be one appropriate for federal law. With regard to the fifth amendment claim, implication of a cause of action in the current case would present the same problems as those recognized by the Fifth Circuit in *Davis*. As Judge Clark pointed out in that decision, "*Because of the breadth of due process, a decision implying as action for money*

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[26] 26 U.S.C.A. § 6213(a) allows a taxpayer, within 90 days after notice of deficiency, to file a petition with the Tax Court for a redetermination of the deficiency. Further, 28 U.S.C. § 1346(a)(1) grants jurisdiction to the district courts for actions against the United States for the recovery of any tax allegedly erroneously or illegally assessed or collected.

[27] 571 F.2d at 799.

damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee."[28] Similarly, although the same problems of breadth of the constitutional provision are not present with the fourth amendment claims, significant difficulties are still encountered. While the matter of abuse of IRS authority is obviously not a matter *"traditionally relegated to state law,"*[29] *the fact that extensive, specific congressional regulation of federal taxation already exists indicates that neither is the matter one appropriate for implied* federal law. Rather, it is a matter which can best be managed by further congressional refinements as these are deemed necessary.

The final consideration with regard to whether a constitutional cause of action is to be implied in this case is whether, notwithstanding congressional action or inaction, a damage action is indispensible to the effectuation of the constitutional rights asserted. Here again, the court concludes that such an action is not constitutionally compelled. In the face of assertions of protected fourth and fifth amendments claims, it is not to be forgotten that the power of Congress *"to lay and collect taxes"* is also constitutionally-mandated.[30] Pursuant to this authority, Congress has enacted one of this nation's most comprehensive legislative schemes. Adequate provision is made a part of this scheme for safeguarding of due process and equal protection, and for

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[28] *Id.* at 799-800.

[29] *Cort v. Ash, supra*, 422 U.S. at 78, 95 S.Ct. 2080.

[30] U.S. Const., amend. XVI.

assurances against unreasonable seizures. The court therefore concludes, that under the facts as here presented, the plaintiff is entitled to no more.

Accordingly, it appears that the plaintiff has not asserted a claim "*aris[ing] under the Constitution, laws, or treaties of the United States.*" Therefore, this court has no jurisdiction to entertain the merits of the litigation. Absent jurisdiction over the subject matter of plaintiff's complaint, the action must be dismissed. Judgment to this effect shall be entered by separate order.

Done this the 11th day of August, 1978.

(s) **Sam C. Pointer, Jr.**
United States District Judge
Sam C. Pointer, Jr.

APPENDIX B

(599 F.2d (1979))

Carl Michael SEIBERT, Plaintiff-Appellant, versus D.T. BAPTIST, District Director of Internal Revenue Service, et al., Defendant-Appellees. No. 78-3007.

United States Court of Appeals, Fifth Circuit. July 30, 1979.

Rehearing Denied Sept. 21, 1979.

Appeal from United States District Court, Northern District of Alabama; Sam C. Pointer, Jr., Judge.

Carl Michael Seibert, pro se.

M. Carr Ferguson, Asst. Atty. Gen., Gilbert E. Andrews, Act. Chief, Gary R. Allen, Atty., Tax Division, U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

ON PETITION FOR REHEARING

(Opinion May 3, 1979, 5 Cir., 1979, 594 F.2d 423)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

On May 3, 1979, we affirmed *Seibert v. Baptist* on the basis of the United States District Judge's Memorandum of Opinoin. Relying on our *en banc* decision, *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), the lower court refused to recognize an implied private cause of action for damages under the due process clause of the fifth amendment. In *Davis v. Passman*, ____ U.S. ____, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979), a ruling announced on June 5, 1979, however, the United States Supreme Court reversed our *en banc* decision and found that a cause of action as well as a damage remedy could be implied under the due process clause of the fifth amendment. We therefore reverse and remand to the district court.

APPENDIX C

(446 U.S. 918, 64 L.Ed.2d 271, 48 L.W. 3651)

Carl Michael SEIBERT, petitioner, v. D.T. BAPTIST, District Director of Internal Revenue Service, et al. No. 79-1309.

Rehearing Denied June 16, 1980.

See 447 U.S. 930, 100 S.Ct. 3030.

Facts and opinion, 594 F.2d 423; 599 F.2d 743.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

April 28, 1980.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV 77-PT-0951-NE
	)	
D.T. BAPTIST, et al.,	)	
	)	
Defendants.	)	

ORDER

In accordance with a contemporaneously entered memorandum opinion, it is ORDERED that:

1. Plaintiff's motion to add party is DENIED.

2. Plaintiff's motion for leave to file amendment to complaint is DENIED. Plaintiff is granted leave to file an amendment as provided in the memorandum opinion entered contemporaneously herewith.

3. Plaintiff's motion for summary judgment is DENIED.

DONE and ORDERED this 4th day of August, 1981.

(s) ROBERT B. PROPST
UNITED STATED DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV 77-PT-0951-NE
	)	
D.T. BAPTIST, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This cause comes on to be heard on plaintiff's Motion to Add Party, plaintiff's Motion for Leave to File Amendment to Complaint, and plaintiff's Motion for Summary Judgment. Defendants, in response to plaintiff's Motion for Summary Judgment, have attempted to renew a Motion for Summary Judgment which the court overruled October 20, 1980. The court notes that there has been no pleading to that effect. The court is of the opinion that defendants cannot renew their Motion for Summary Judgment in a responsive brief, and has concluded that

the matter is not properly before the court.

At the outset the court is of the opinion that a recitation of the history of this cause is needed to place the case in a proper perspective. Plaintiff filed a *pro se* complaint against the District Director of the Internal Revenue Service, four officials of the IRS, two Huntsville Policemen, and a Madison County Circuit Judge. The facts surrounding this cause are set out in Judge Pointer's Memorandum of Opinion dated August 11, 1978. Judge Pointer, in an exhaustive review of plaintiff's complaint, granted the defendants' motion to dismiss, which Judge Pointer had treated as a motion for summary judgment under Rule 56, Fed. R. Civ. P. Judge Pointer's final conclusion was that the court lacked jurisdiction to entertain the merits of the litigation, and that the action must, therefore be dismissed.

Judge Pointer divided his analysis of jurisdiction into asserted statutory and constitutional grounds. He concluded that the asserted statutory bases of jurisdiction were without merit, with little accompanying discussion. With a great deal more discussion Judge Pointer likewise concluded that the asserted constitutional bases of jurisdiction, the fourth amendment and the fifth amendment claim, that the seizure in this case was not so unreasonable as the seizure involved in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and, thus, the injury inflicted on the plaintiff did not directly infringe upon any fourth amendment guarantee, that congressional activity in the field indicated an intent to deny any remedy against Internal Revenue Service officials for their actions to collect taxes, that the extensive statutory regulation of

Internal Revenue matters suggested than an implication of a private cause of action would be inconsistent with the statutory scheme enacted by Congress, and that an implied cause of action based upon the fourth amendment in this case would be inappropriate in view of the fact that extensive, specific congressional regulation of federal taxation already exists.

Judge Pointer held, as to the fifth amendment claim, that an allegation of the denial of due process did not appear to satisfy the requirement of direct infringement of a constitutional right, that, again, the congressional activity in the field indicated an intent to deny any remedy against IRS officials for their actions in assessing and collecting taxes, that implication of a damage remedy from the provisions of the fifth amendment due process clause would be judicially unmanageable, and that implication of a cause of action based

upon the fifth amendment in the current case would extend an action for damages to any constitutional guarantee.

From Judge Pointer's decision, plaintiff appealed. The Fifth Circuit affirmed, per curiam, on the basis of Judge Pointer's memorandum opinion, and appended a copy of that opinion to its decision. *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979).

The gist of Judge Pointer's decision, as this court reads it, was to hold that, while the Supreme Court had recognized that a person might have a cause of action based upon the fourth amendment (*Bivens*, *supra*), the same factors which led the Supreme Court in *Bivens* to hold that a cause of action might be based directly upon the fourth amendment were not present in this case; and, thus, plaintiff could not assert a cause of action based directly upon the fourth amendment. Further,

Judge Pointer held, in essence, that the Supreme Court had not, to that date, held that an implied cause of action might be based directly upon the Fifth amendment, that the Fifth Circuit had extensively addressed the question in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), and had answered in the negative, and that, for similar reasons the Fifth Circuit had held in *Passman* that an implied cause of action could not be based directly upon the fifth amendment, the plaintiff in the current case could not base an implied cause of action directly upon the fifth amendment.

On June 5, 1979, the Supreme Court reversed the Fifth Circuit's *en banc* decision in *Passman* (*Davis v. Passman*, 442 U.S. 228 (1979)) and held that an implied cause of action could be directly based upon the fifth amendment. Thus, on Petition for Rehearing

in *Seibert v. Baptist*, the Fifth Circuit reversed and remanded to the district court.

The case was then reassigned from Judge Pointer to this judge. Plaintiff had, by that time, engaged legal counsel, who filed an Amended and Redrafted Complaint, naming five officers of the IRS and Steven M. Beshears, who is alleged to have been a paid informer of the Huntsville Police Department. In his Amended and Redrafted Complaint, plaintiff alleged everything he had alleged in his original complaints before Judge Pointer, resurrecting claims previously found insufficient by Judge Pointer in his August 11, 1978 memorandum opinion, and asserting the additional claim against Steven Beshears. Plaintiff subsequently filed a motion to dismiss one of the IRS officials, which the court granted. What remained, then, was a blanket

complaint against four IRS officials and Steven Beshears.

At about the same time plaintiff had engaged legal counsel, new Justice Department counsel entered the case, and moved for summary judgment on the basis of absolute immunity. That motion was denied by the court October 20, 1980. As can be readily seen, with the exception of the parties, new players had entered the drama subsequent to the Fifth Circuit's remand: a new judge, new counsel for plaintiff, and new counsel for the federal defendants.

To further complicate matters, plaintiff and his newly engaged counsel had irreconcilable differences of opinion as to methods of proceeding in the prosecution of plaintiff's case. Counsel's Motion to Allow Withdrawal of Counsel was granted after no objection was received from plaintiff within 10 days after

said motion was filed. Plaintiff is, thus, once again, *pro se*.

The court has recited the history of this case to place the case in proper perspective. The court is of the opinion that this cause is to proceed, if at all, only on plaintiff's claimed implied cause of action based directly upon the fifth amendment. While the Fifth Circuit on rehearing reversed and remanded the cause to this court, Judge Pointer's analysis of plaintiff's claims, other than his analysis of the implied cause of action based upon the fifth amendment, is accurate. Plaintiff's claims, other than his claim based directly upon the fifth amendment, cannot be maintained.

Thus, the case is in this posture: plaintiff claims that the federal officials, acting in their individual capacities, denied plaintiff due process of law; jurisdiction is based

on 28 U.S.C. § 1331 and the fifth amendment. The record indicates that Steven Beshears has never been served a complaint. All other claims are insufficient.

The court will now address the pending motions.

MOTION TO ADD PARTY

The motion purports to add Larry R. Hyatt, who was, at the time of the acts made the basis of plaintiff's fifth amendment claim, Group Manager of Special Agents for Huntsville and Birmingham, under Rule 21, Fed. R. Civ. P. Since the applicable statute of limitations has run, however, the same factors in determining whether an amendment to a complaint will be allowed to "relate back" to a timely original or amended complaint must be determined by the court in the motion under consideration. See generally 7 C. *Wright & A. Miller*, stated as follows:

> (1) 'the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurence set forth or attempted to be set forth in the original pleading'; (2) 'the party to be brought in by amendment . . . has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits'; and (3) 'the party to be brought in by amendment . . . knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.' . . . And the defendant received notice of the action 'within the period provided by law for commencing the action against him.'

Kirk v. Cronvich, 629 F.2d 404, 407 (5th Cir. 1980).

At the outset, the court emphasizes that because of the lengthy and somewhat muddled history of this case, and because this case has already been on appeal once, the court has analyzed plaintiff's claim and plaintiff's motion in the most liberal posture. The court has construed any doubts in plaintiff's favor.

The first factor is arguably met. Even though no new claims are asserted, it is obvious from reading the depositions filed that Hyatt's involvement was different than the involvement of defendants already named. Nevertheless, the motion, as drafted, simply seeks to add Hyatt. The second factor is met by virtue of the identity of interest between Hyatt and the other parties already named as defendants in the suit. *Kirk, supra*, at 408 n.4. Hyatt made a recommendation, or concurred in a recommendation, that plaintiff's tax year be terminated. Thus, Hyatt was so closely related in his business operations or other activities with the other parties that the institution of the action against one served to provide notice of the litigation to Hyatt under the idea of interest theory. Moreover, some defendants named in the original complaint were under the supervision of Hyatt, much like

the defendants originally named in *Kirk* were under the supervision of the Sheriff sought to be added as a party. Thus, the court will make the same assumption that the Fifth Circuit made in *Kirk*, namely that the special agents previously named brought the matter to the attention of Hyatt, who was in charge of the department.

While Hyatt claims he would be prejudiced by being added at this late date, the court notes that Hyatt is represented by the same counsel that represents the other defendants, again a similar factor the Fifth Circuit noted in *Kirk*. When Hyatt's agents and their attorney learned of the suit against them, "they should have taken steps to investigate the claim, including collecting and preserving evidence against any forseeable eventuality. Therefore, Hyatt cannot claim that he has been prejudiced through the loss of evidence of by undue surprise." *Kirk*, *supra*, at 408.

Notwithstanding that two of the factors for relation back are arguably met in the case *sub judice*, the other two factors which were met in *Kirk* are not met in the case *sub judice*. First there is absolutely nothing to indicate that Hyatt "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." This case is unlike the situation presented in *Kirk*. There, the party sought to be added was, at all relevant times, the Sheriff of Jefferson Parish. It was undisputed that the sheriff was the person to be served with the conplaint and summons. Counsel conceded that the sheriff and not the sheriff's office was the proper party. The sheriff, therefore, knew or should have known that he was the party who should have been sued. In the case *sub judice*, there are no comparable facts to those present in *Kirk*.

Neither plaintiff's *pro se* complaint, nor the amended and redrafted complaint filed by plaintiff's counsel upon his entry into the case contains any allegation describing Hyatt's position or sufficiently placing Hyatt on notice that plaintiff intended to sue Hyatt. The court would simply have to read plaintiff's *pro se* complaint with far greater reach than even *pro se* complaints are entitled to reach the conclusion that Hyatt knew or should have known that, but for a mistake of his identity, he is the party who should have been sued.

On the contrary, the complaint in this case shows that the agents working under Hyatt and Hyatt's supervisors were named as defendants. Logic compels the conclusion that Hyatt's identify would be as easily discovered as those defendants actually named. There is nothing in the record to indicate that Hyatt actively sought to secrete himself or his identity from

plaintiff's knowledge. In fact, Hyatt's deposition testimony affirmatively shows that the first he knew about the case was in December, 1980. Instead of knowing that he should have been sued, or would have been sued had plaintiff not been mistaken as to his identity, Hyatt could well have concluded that plaintiff had made a conscious decision not to bring the action against him. There was no mistake as to Hyatt's identity. There may have been an oversight, or inadvertance, or a lack of diligence in investigating plaintiff's claim, but the court finds that such is not excusable. The mistaken identity factor being absent would, of itself, require that plaintiff's motion be denied.

Second, the complaint against the IRS agents was not filed within one year of accrual of the claim which at the latest accrued against Hyatt July 10, 1973, one year after Hyatt either

recommended or concurred in a recommendation to terminate plaintiff's taxable year. The depositions show that the recommendation was the only contact Hyatt had with plaintiff's tax problems. The complaint was not filed in this case until July 11, 1977, and the earliest service date on any one of the federal officials was July 20, 1977. Thus, there is no way Hyatt received notice of the action within the period provided by law for commencing the action against him. *Kirk, supra*, at 407.

In view of the fact that the factors for relation back are not present, plaintiff's Motion to Add Party is due to be denied.

MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

Plaintiff seeks to amend his complaint to allege a cause of action against defendant Baptist under 5 U.S.C. § 552(a)(4)(A)(B) for aiding, sanctioning, ordering or otherwise

directing the wilful secretion or destruction of information. The information allegedly so secreted or destroyed was Seibert's file, apparently the file maintained in the district office.

Even a cursory reading of the statute indicates that it provides no cause of action in damages against one who fails to disclose information. Rather the statutory scheme of the Freedom of Information Act is to provide a procedure for individuals to obtain information from government agencies.

When an individual feels that information has been wrongfully withheld, the statute grants a federal district court, upon complaint, jurisdiction to enjoin the subject agency from withholding the records sought and to order the production of any records improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(b)(1976). It does not provide for a direct

cause of action by the complainant for damages. Thus, plaintiff's motion, to the extent it seeks to amend this complaint to include a cause of action against defendant Baptist for wilfully secreting information is due to be dismissed. The court will, however, grant plaintiff leave to file a proposed amendment for proper relief provided by the Freedom of Information Act. The court will hold plaintiff's motion in abeyance until plaintiff files a proposed amendment.

MOTION FOR SUMMARY JUDGMENT

Plaintiff contends that defendants' actions have deprived him of due process as a matter of law and that he is, therefore, entitled to judgment as a matter of law under Rule 56, Fed. R. Civ. P. In response to plaintiff's motion, defendants have filed a brief asserting that they are entitled to summary judgment on

the basis of immunity and the statute of limitations. As the court has previously noted, defendants have not filed a second motion for summary judgment, nor have they filed a motion to renew their initial motion for summary judgment. The court is thus, of the opinion that there are not cross motions for summary judgment.

While there is authority that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56, *Bank of Lexington v. Jack Adams Aircraft Sales*, 416 F. Supp. 17, 19 (N.D. Miss. 1976), 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2720, pp. 467-471 (1972), the court is reluctant to grant summary judgment, if warranted, to defendants absent a formal motion, especially when the issue of the statute of limitations has not been addressed

in any previous proceeding. Judge Pointer never addressed that issue; and it has not been addressed by this judge. Defendants relied solely on absolute immunity in the motion for summary judgment filed in September, 1980.

Nevertheless, even though defendants have not filed a formal cross-motion for summary judgment, the court is of the opinion that the immunity *vel non* of defendants and the statute of limitations are proper issues for consideration, if not determination, in determining whether plaintiff is entitled to judgment as a matter of law.

The court is, quite frankly, surprised that this case could be pending at this point in time without a resolution of the statute of limitations issue; and the court is of the opinion that the issue may well be determinative of the case. Plaintiff's complaint is essentially that the defendants abused their

authority in terminating plaintiff's taxable period and that they did not follow the prescribed procedure to make jeopardy assessments of income tax deficiency; by doing so, the federal defendants are alleged to have violated plaintiff's right to due process.

These acts occurred between July, 1972 and August, 1974. The question then arises as to what statute of limitations is applicable. Obviously, there is no statute of limitations provided by federal common law. The court must, therefore, look to state law to determine the most analagous statute of limitations. The court is of the opinion that Alabama's one-year statute of limitations, Ala. Code § 6-2-39(5), "Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . . ," is the appropriate statute of limitations.

Plaintiff makes two contentions. The first is that these federal defendants were involved in a conspiracy to deprive plaintiff of his due process rights and that the conspiracy did not end until January 17, 1977 when the United States Tax Court entered an order in plaintiff's favor. The deposition of defendant Baptist, however, indicates that any involvement by his office (and all these defendants worked under Baptist) ended in August, 1974 upon issuance of a notice of deficiency. From that point forward, the case was handled entirely by the Internal Revenue's District Counsel, whose duties included trial work in the Tax Court. There is no allegation of a conspiracy existing between Baptist and his employees and the IRS's District Counsel Thus, any conspiracy between the federal defendants named terminated on August 7, 1974. If the one-year statute of limitations is applicabl

it is clear that the suit, being filed on July 11, 1977, was filed after the statute had run.

Plaintiff's second contention is that the 10-year statute of limitations, Ala. Code § 6-2-33(3), "Motions and other actions against sheriffs, coroners, constables and other public officers for nonfeasance, misfeasance or malfeasance in office," is the applicable statute of limitations. Plaintiff cites no cases showing that the 10-year statute would be applicable to federal Internal Revenue Service officers. The court has found no cases which would lead to that conclusion, even by analogy. The court is the opinion that the 10-year statute of limitations is applicable in cases where the public official is charged with conversion or misappropriation of funds entrusted to him, not where the public official is charged with violating a person's constitutional rights. The Fifth Circuit has specifically held that

in the analagous 42 U.S.C. § 1983 situation the Alabama one-year statute of limitations is applicable. *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980). Thus, it appears that, upon appropriate motion, this cause may be due to be dismissed based upon the statute of limitations.

Turning now to the immunity *vel non* of the federal defendants, the court is now of the opinion that defendants Baptist and Magill may be absolutely immune from liability for their actions. Their depositions indicate that they were "responsible for the decision to initiate or continue a proceeding subject to agency adjudication." *Butz v. Economou*, 438 U.S. 478, 516 (1978); *Stankevitz v. IRS, et al.*, No. 79-4214 (9th Cir. Jan. 12, 1981); *Dedman v. Vowell*, No. J-C-80-103 (E.D. Ark. Jan. 19, 1981). Baptist was District Director of the IRS. Magill was Baptist's first

assistant and was Acting Director when Baptist was out of the office. The depositions on file indicate that when the District Director or the Acting District Director decide to issue a jeopardy assessment or a notice of deficiency, he did so exercising his independent judgment on whether such action was warranted. The decision to issue the jeopardy assessment and the notice of deficiency in this case were clearly within the decision-making process of defendants Baptist and Magill, and were, therefore, akin to the prosecutorial decisionmaking process recognized absolutely immune in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and analogized to Agriculture Department officials in *Butz v. Economou*, *supra*.

As to the other two federal officials named as defendants, Lee Willingham is alleged to have wrongfully seized plaintiff's

property, and Frank McCammon is alleged to have violated plaintiff's right to equal protection by refusing to investigate Steven Beshears. It would appear that the only claim alleged against Willingham, the wrongful seizure of property, was laid to rest by Judge Pointer's previous decision holding that plaintiff had no implied cause of action on the fourth amendment because plaintiff had not alleged conduct similar to that present in *Bivens*. The court again points out that the Fifth Circuit did not withdraw its initial affirmance in *Seibert v. Baptist;* it is the court's opinion that the only effect of the Fifth Circuit's order on rehearing was to reverse and remand as to the fifth amendment claim. In any event, on proper motion, it appears that the claim against Willingham may be due to be dismissed.

The court has carefully considered the

claim alleged against defendant McCammon to determine whether a cognizable cause of action is stated. McCammon's affidavit and deposition indicate that McCammon has had very minimal contact with plaintiff. Plaintiff attempted to present information concerning Steven Beshears to McCammon. McCammon states that plaintiff presented no documentary evidence to support his allegations against Beshears, that the information plaintiff presented which was tax related was recorded, and that an investigation, in McCammon's opinion, was not warranted. The one meeting between plaintiff and McCammon is McCammon's only contact with the case. For refusing to investigate Steven Beshears, McCammon is alleged to have in some manner violated plaintiff's constitutional right to equal protection. The allegations simply fail to state a claim against McCammon. On proper motion, it would appear that the

claim against McCammon is due to be dismissed.

As can be readily ascertained from the foregoing analysis, plaintiff is not entitled to judgment as a matter of law. There are serious questions as to whether plaintiff is even entitled to proceed with his claims. The court is of the opinion that a combination of events have thrown this cause into a morass. Even though the case has been pending for more than four years, very few substantive issues have been addressed. As the court has noted, the statute of limitations issue has yet to be addressed. The immunity issue was addressed in October, 1980, but the court has indicated that it may have well reached the wrong conclusion at that time. And finally, all though the Fifth Circuit reversed and remanded on the fifth amendment claims, it did not hold that plaintiff had asserted a cause of action against every defendant. Even

though plaintiff's former legal counsel filed an amended and redrafted complaint, defendants have not tested the sufficiency of plaintiff's claims based upon the fifth amendment.

An order denying plaintiff's Motion to Add Party and Motion for Summary Judgment and directing plaintiff to file a proposed amendment based upon theFreedom of Information Act will be contemporaneously entered with this Memorandum Opinion.

DONE this 4th day of August, 1981.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

CERTIFICATE OF SERVICE

It is hereby certified that 3 copies of the foregoing Petition for Writ of Certiorari were with date deposited with the United States Postal Service, postage first class prepaid, and properly addressed to the Honorable Rex Lee, Solicitor General, 10th Street and Pennsylvania Avenue, N.W., Room 5614, Department of Justice, Washington D.C. 20530. This the 9th day of November, 1983.

HON. J. STEPHEN SALTER
GROENENDYKE AND SALTER
2205 Morris Avenue
Birmingham, Alabama 35203
Tel. (205) 251-6666

Attorney for Petitioner

By: /s/ J. Stephen Salter

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83-807

No. .....

IN THE

Supreme Court of the United States

October Term 1983

Carl Michael Siebert,

Petitioner

vs.

D.T. Baptist, District Director
of Internal Revenue Service, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

ORDER

The Motion for Summary Judgment filed by defendant Frank McCammon is GRANTED. Plaintiff's complaint against said defendant is DISMISSED, with prejudice; with costs to plaintiff. The court reserves judgment on all other pending motions.

DONE and ORDERED this 3rd day of December, 1981.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

For the first time this court has had an opportunity to begin a full review of the evidence before this court on Motion for Summary Judgment. This review is continuing, but the court has already made a determination as to defendant Frank McCammon.

Basically, as to defendant McCammon, plaintiff charges that he was rude to plaintiff and that he refused to consider matters presented by plaintiff concerning Steve Beshears.

The court notes that this episode involving defendant McCammon took place not earlier than 1973 and possibly as late as 1974. There is no indication that McCammon had anything to do with the termination of plaintiff's taxable year or any assessment or seizure made thereafter. Apparently, plaintiff desired that McCammon investigate the tax liability of Beshears. He was offended by McCammon's refusal to investigate Beshears and his rudeness directed toward plaintiff. None of the alleged conduct of McCammon, if true, would arise to the level of violating any constitutional right of plaintiff; particularly under the Fifth Amendment.

The Motion for Summary Judgment of defendant Frank McCammon will be granted.

An order consistent with this memorandum opinion will be contemporaneously entered.

This the 3rd day of December, 1981.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV-77-PT-0951-NE
	)	
D.T. BAPTIST, et al.,	)	
	)	
Defendants.	)	

ORDER

On August 21, 1981, the individual federal defendants in the above styled action filed with this court a Motion for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure. As grounds for and in support of said Motion, the defendants listed, *inter alia*, that defendants were absolutely immune from suit for damages in claims such as those involved in the case at bar. On September 15, 1981, defendants filed a Memorandum in Support of Defendants' Motion for Summary Judgment. Among the questions presented in the defendants' Memorandum was:

> "2. Whether the defendants acted in good faith, without malice, and in the belief that their actions were in full compliance with their statutory duty and the Constitution, and are therefore protected from this suit for damages under the doctrine of qualified official immunity." (emphasis added).

Since the filing of the last Motion raising the ground of qualified official immunity, dated September 15, 1980, and this court's order entered October 20, 1980, overruling such Motion, there has been significant discovery in this case by way of depositions taken upon oral examination. The consideration of a Motion for Summary Judgment requires the review and careful consideration of any undisputed facts before the court by way of affidavit, deposition or other discovery form.

In light of the foregoing, this court will reconsider the question presented in defendants' Memorandum of September 15, 1981, concerning qualified immunity. However, the court wishes to avoid any question as to notice

to plaintiff as to the grounds for said motion.

The Court hereby DIRECTS that the parties shall, within fifteen (15) days after the entry of this order, extract for and present to the court any undisputed factual data in depositions of affidavits upon which they may rely in support of or in opposition to the defense of qualified official immunity.

DONE and ORDERED this 3rd day of December, 1981.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT, Plaintiff,	)	
v.	)	CIVIL ACTION NO.: CV77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants.	)	

ORDER

In accordance with a Memorandum Opinion contemporaneously entered the court hereby grants the Motions for Summary Judgment of defendants Baptist and Magill and partially grants the Motion for Summary Judgment of defendant Willingham.

All claims of plaintiff against defendants Baptist and Magill are DISMISSED with prejudice.

All claims of plaintiff against defendant Willingham except those relating to the

disposition, after seizure, of the guitar and currency collection, are DISMISSED with prejudice.

The following motions are OVERRULED:

1. Plaintiff's Motion for Rehearing filed August 21, 1981;

2. Plaintiff's Motion to Suspend Time for Response to Pre-Trial Order filed August 26, 1981;

3. Motion to Enlarge, Stay the Order, and/or Grant Interlocutory Appeal filed by plaintiff on September 9, 1981; and

4. Plaintiff's Motion to Compel filed September 18, 1981.

The following motion is GRANTED: Defendants' Motion for Protective Order filed November 19, 1981.

DONE and ORDERED this 8th day of January, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case comes on to be heard on various motions, all now under submission, as hereinafter discussed.[1]

This case was reassigned to this judge after its reversal by the Fifth Circuit Court of Appeals. See *Seibert v. Baptist*, 599 F.2d 743 (5th Cir. 1979). The case against these defendants had been dismissed, on a motion to

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[1] The motions have been filed by plaintiff and defendants Baptist, Willingham, Magill and McCammon. Defendant Beshears has never been served.

dismiss, by Judge Pointer of this court. The jurisdictional issues concerning the case and an overview of the jurisdictional allegations are discussed in a Memorandum Opinion entered by Judge Pointer of this court which was originally adopted by the Fifth Circuit Court of Appeals in a decision reported as *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979).

In Judge Pointer's opinion, he ultimately held that plaintiff had no cause of action under 28 U.S.C. §§ 2201-02, 42 U.S.C. § 1983, or 42 U.S.C. § 1985. He further held that there was no jurisdiction under 42 U.S.C. § 1331 for constitutional violations under the Fourth and Fifth Amendments to the United States Constitution. As to the Fourth Amendment claim, Judge Pointer stated: "Similarly, while in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate

notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*." 594 F.2d at 431. Judge Pointer thus concluded that plaintiff had no cause of action under the Fourth Amendment.

As to the Fifth Amendment claim, Judge Pointer relied upon the Fifth Circuit decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), and held that there was no implied cause of action under the Fifth Amendment.

The Fifth Circuit initially affirmed Judge Pointer's decision. Subsequently, *Davis v. Passman, supra*, was reversed by the United States Supreme Court, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), and in *Seibert v. Baptist*, 599 F.2d 743 (5th Cir. 1979), the court reversed and remanded this case on the basis that the United States Supreme

Court had found that a cause of action as well as a damages remedy could be implied under the due process clause of the Fifth Amendment. In a motion filed June 22, 1981, plaintiff has acknowledged that, "Then on Petition for Rehearing filed on May 22, 1979, the court below reversed only the Fifth Amendment jurisdiction on the basis of *Davis v. Passman*, 99 S.Ct. 2264, 60 L.Ed.2d 1979."

After the case was reassigned to this court, the court has, on several occasions, attempted to set the case for trial. This effort has been interrupted by an initial indication of unreadiness for trial and several motions, including a motion for continuance filed by the plaintiff and a withdrawal of plaintiff's attorney.

Presently before the court for consideration are:

1. Plaintiff's Motion for Rehearing

filed August 21, 1981;

2. Defendants' Motion for Summary Judgment filed August 21, 1981;

3. Plaintiff's Motion to Suspend Time for Response to Pre-Trial Order filed August 26, 1981;

4. Motion to Enlarge, Stay the Order, and/or Grant Interlocutory Appeal filed by plaintiff on September 9, 1981;

5. Plaintiff's Motion to Compel filed September 19, 1981. This motion was previously set for hearing, but the parties agreed that it was unnecessary to hold the hearing; and,

6. Defendants' Motion for Protective Order filed November 19, 1981.

The claims which are presumably before the court are those grounded on violations of the Fourth and Fifth Amendment, the court having jurisdiction thereof under 28 U.S.C. § 1331, and claims under 42 U.S.C. §§ 1983,

1985, and 1986.[2]

Defendants' Motion for Summary Judgment filed August 21, 1981 is premised on four arguments:

1. That the cause is barred by a one year statute of limitations;

2. That defendants are absolutely immune from liability under *Stankewitz v. Internal Revenue Service*, No. 79-4214 (9th Cir. Jan. 12, 1981); *Dedman v. Vowell*, No. J-C-80-103 (E.D. Ark. Jan. 18, 1981);

3. That as to Defendant Willingham, plaintiff states only a claim under the Fourth

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[2]There is an obvious question as to whether the claims, other than the Fifth Amendment claim, are still before the court. However, in the instance, the claims are so closely related, the court feels it best to consider the claims under all theories for the purposes of the pending Motion for Summary Judgment. Plaintiff now claims (by amendment filed after the Fifth Circuit cases) that defendants conspired with state employees.

Amendment which has been proscribed by Judge Pointer's decision and the Fifth Circuit's affirmance with regard to Fourth Amendment claims; and,

4. That as to Defendant McCammon plaintiff makes only a claim of a refusal to investigate the tax liability of Stephen Beshears. The court has previously held that neither this claim, nor the claim of plaintiff that McCammon was rude to him, support any federal claim, and has dismissed the claim(s) against McCammon.[3]

The court noticed that, although defendants had not listed claimed "qualified immunity" as a ground for their Motion for Summary Judgment filed on August 21, 1981, they had argued for it in briefs filed with the court.

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[3]The court also notes that this claim was clearly barred by the statute of limitations.

To avoid any question of notice, the court has advised the parties that the defense of qualified immunity would be considered on the Motion for Summary Judgment of defendants.

Although Judge Pointer treated defendants' Motion to Dismiss as a Motion for Summary Judgment under Rule 56, he only gave consideration to the jurisdictional allegations and did not consider the qualified immunity or statute of limitations defenses. He mentioned the absolute immunity defense in passing, but did not relate it to any facts or discuss it fully.

On October 22, 1980, this court entered on order denying defendants' Motion for Summary Judgment filed September 15, 1980. The court held at that time that there was no absolute immunity and that there had not been sufficient time for discovery (since the case was reassigned to this court) with regard to the qualified immunity defense. Since this court's

ruling on that motion, the case of *Stankewitz v. Internal Revenue Service*, 640 F.2d 205 (9th Cir. 1981) has been decided. Further, the plaintiff has now completed considerable discovery. Thus, the court is of the opinion that it is appropriate to consider the refiled Motion for Summary Judgment.

In hearing this Motion for Summary Judgment, this court has considered the following:

1. Deposition of Randall Duck filed 12/17/80;

2. Deposition of Phillip Weir filed 12/17/80;

3. Deposition of Harold E. Grierson filed 12/22/80;

4. Deposition of Donald W. Houton filed 12/22/80;

5. Deposition of Frank W. Magill filed 12/22/80;

6. Deposition of Columbus Sanders filed 12/22/80;

7. Deposition of Frank A. McCammon filed 12/29/80;

8. Deposition of Meridith Lee Willingham filed 12/31/80;

9. Deposition of D.T. Baptist filed January 5, 1981;

10. Deposition of Larry R. Hyatt filed January 8, 1981;

11. Deposition of Sam Acquisto filed 1/12/81;

12. Deposition of Carl Michael Seibert filed 4/20/81;

13. Motion for Rehearing filed by plaintiff on 8/14/81;

14. Affidavit of Carl Michael Seibert filed 10/6/80;

15. Affidavit of Mary C. Seibert dated 9/30/80 (attached to affidavit of Carl Michael

Seibert filed 10/6/80);

16. Motion in Opposition, etc. filed by plaintiff on June 22, 1981;

17. Various documents filed in support of and in opposition to the Motion for Summary Judgment as attachments and otherwise.

The defendants (who have been served) who remain in the case are D.T. Baptist, Frank W. Magill, Jr., and Lee Willingham.

The claims against these defendants are as follows:

1. D.T. Baptist:

a. He conspired with other defendants and state officials to deprive plaintiff of his civil rights;

b. That he was District Director of Internal Revenue Service when plaintiff's tax year was terminated and generally employed and directed the joint effort between the office and powers of I.R.S. and local police to

harass the plaintiff, an alleged drug offender, without cause, reason or justification. Said defendant rejected plaintiff's 1040's for 1972 and 1973, raising the tax to $8,257.73 and assessing $368.70 in penalties. Said defendant, together with others, refused plaintiff's repeated written requests for interviews or explanations, and withheld from plaintiff information in his file. He issued the deficiency notice approximately two years after Notice of Termination.

2. Frank Magill, Jr.:

a. He conspired with other defendants and state officials to deprive plaintiff of his civil rights;

b. That he terminated plaintiff's taxable year on July 10, 1972 without probable cause.

3. Lee Willingham:

a. He conspired with other defendants

and state officials to deprive plaintiff of his civil rights;

b. That he levied on all property seized in the drug arrest by the Huntsville Police Department, seized plaintiff's father's automobile, plaintiff;s guitar, plaintiff's currency collection, and his bank account. He seized said property before giving notice of termination, wrongfully converted plaintiff's guitar and currency collection, failed to give information about the assessment or its amount, and failed to examine evidence exculpating plaintiff of the I.R.S. charges of criminal activity and income therefrom.

FACTS

Considered most favorably to plaintiff, the facts are as follows:

On about July 4th or 5th, 1972, Stephen Beshears, an acquaintance of plaintiff, came to plaintiff's residence in Huntsville,

Alabama and asked him to go meet Beshears' cousin from Mobile. Plaintiff says that on the way to Cotton Club to meet the cousin, Beshears informed plaintiff that he had some drugs, likely LSD, and asked plaintiff to hand his "cousin" some envelopes. Plaintiff refused and accused Beshears of attempting to "(s)et me up." This led to a belligerent argument before plaintiff returned to his home.

On July 7, 1972, Beshears returned to plaintiff's residence at about 5:30 p.m., again asking plaintiff to go meet his cousin so he could convince plaintiff he was okay. Plaintiff refused to go. Upon leaving, Beshears asked plaintiff for an envelope and plaintiff gave him a "(l)ight blue one."

Later that same evening, Plaintiff put his Martin D35 guitar and an overnight bag containing $460.00 in cash in the trunk of his vehicle and headed for Athens College in

Athens, Alabama. At about 6:30 p.m., two Huntsville policemen pulled his car over just down the street from plaintiff's residence. The policemen, with guns drawn, got out of an unmarked car. One of the policemen identified himself, required plaintiff to put his hands on the top of his car and removed items from plaintiff's person. The policemen did not have a search warrant for the automobile. Plaintiff was placed under arrest. One of the officers pulled two envelopes from the car and held them up for viewing by television cameras which were already on the scene. Plaintiff denies having previously seen the envelopes. One of the envelopes was apparently the one plaintiff had given Beshears earlier in the day. The envelopes contained LSD.

The police officers then opened the trunk of the vehicle, again without a search warrant, and searched it. At this time there were

numerous policemen and representatives of the news media present.

Plaintiff was returned in handcuffs to his residence. Claiming to have a search warrant for the residence,[4] the policemen searched the residence, including plaintiff's room, and found a small amount of marijuana, which plaintiff acknowledges as his, and $2,000.00 in cash. Five to six hundred dollars was ordinary cash, twelve bills were 1935 uncirculated silver certificates, and the rest was in old bills which plaintiff had saved. The policemen also found pieces of paper with ninety doses of LSD and a small amount of hasish someone had given to plaintiff.

The plaintiff and a number of policemen and newspaper reporters stayed at the residence

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[4]The residence was that of plaintiff's parents, but he had a room there.

for about two and half hours. Plaintiff's parents were not initially present, but returned at about 7:15 p.m. They were informed that plaintiff was under arrest for possession of LSD.

Shortly before plaintiff was taken to the police station one of the police officers made a phone call and told plaintiff's parents, "They'll be here in about fifteen minutes."[5] Two IRS agents, who have not been identified, came to plaintiff's residence at about 8:00 p.m., after plaintiff had left, and directed the police officers in the seizure of the currency.

Later, while plaintiff was in jail, he was served a written notice of seizure. The notice was signed by defendant Magill and

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[5]Plaintiff's mother says in her affidavit that officer Randall Duck told her that IRS agents "(s)hould be coming over from the Clinton Building (or Clinton Street) in about 15 minutes."

served by defendant Willingham. The automobile,[6] guitar,[7] the currency and a bank were levied upon.

Plaintiff was subsequently indicted for possession of LSD. He was originally convicted, but his case was reversed on appeal.[8] Plaintiff originally named the arresting police officers, Duck and Patterson, along with state trial judge, as defendants in this action. On September 29, 1977, plaintiff moved to dismiss defendants Duck and Patterson. These defendants were dismissed with prejudice on October 4, 1977. These defendants were

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[6] Later determined to be owned by his father.

[7] Later returned by IRS to Veronica Potter.

[8] *Seibert* v. *State*, 292 Ala. 748, 298 So.2d 652 (1974); *Seibert* v. *State*, 343 So.2d 796 (1976); *Seibert* v. *State*, 343 So.2d 788 (1977); *Seibert* v. *State*, 53 Ala. App. 229, 298 So.2d 649 (1974); *Seibert* v. *State*, 343 So.2d 780 (Ala. Cr. App. 1975); *Seibert* v. *State*, 343 So.2d 785 (Ala. Cr. App. 1976); *Seibert* v. *State*, 343 So.2d 787 (Ala. Cr. App. 1977).

dismissed under an agreement not to continue the criminal prosecution against plaintiff. The state trial judge was dismissed by Judge Pointer of the basis of judicial immunity on November 9, 1977.

The court assumes, for the purpose of the pending motions, that plaintiff was innocent of all crimes for which he was indicted. The court further assumes that plaintiff could perhaps prove, at a trial, that the police and Beshears "set plaintiff up" as plaintiff claims.

In addition to complaining of the actions of the unidentified agents who came to his residence on July 7, plaintiff complains of the various actions of IRS in terminating his tax year and its subsequent collection actions. On July 10, 1972, Larry R. Hyatt, a Group Manager or Group Supervisor of the Intelligence Division, recommended that plaintiff's 1972 tax year be terminated effective July 7,

1972. Hyatt's letter recommendation accompanied a Form 2644, the form used by IRS for recommendations of jeopardy and termination assessments. The Form 2644 was routed through and approved by the chiefs of the Birmingham Audit Division, Intelligence Division, and Collection Division. It was approved by defendant Magill as Acting Director.[9]

The letter from Hyatt stated that the Huntsville Police Department executed a search warrant and found 90 LSD blotters in his bedroom and 1,000 LSD blotters in his automobile. The letter from Hyatt calculated that plaintiff had been clearing $960.00 per week selling LSD blotters. Based on these calculations his 1972 tax due was calculated to be

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[9]Neither Agent Tom McWhorter, who made the original request for the termination assessment, nor the Division Chiefs who approved the request, are defendants in this cause.

$6,458.00.[10] This calculation was based on sketchy estimations from an alleged informer and the Huntsville Police Department and was incorporated into the Form 2644 recommendation. Defendant Magill relied on the information presented to him and on July 10, 1972 approved the termination recommendation and directed the Collection Division "(t)o make the necessary assessments immediately and take such steps for collection as are provided by law."

Pursuant to defendant Magill's approval, plaintiff was served with "Notice of Termination of Taxable Period" dated July 10, 1972. This notice, signed by Magill, declared income tax in the amount of $6,458.00 immediately due and payable and demand for payment was made. Plaintiff was not served with a notice of

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[10] The assessment was presumably calculated by an unidentified revenue agent. This agent is not a defendant. There is no evidence that any defendant in this cause made the calculation.

deficiency within 60 days after the making of the termination assessment. He was served with a notice of seizure. There is no evidence that defendant Magill knew plaintiff or that he bore any malice toward him. He relied on the documents before him and the recommendations of the Division Chiefs.[11]

On August 7, 1974 a statutory notice of deficiency was issued to plaintiff. Plaintiff petitioned the Tax Court for a redetermination of the amount of deficiency. On January 17, 1977, the Tax Court entered an order that plaintiff was entitled to a full refund of the 1972 assessment. This came as a result of an agreement between plaintiff and IRS.

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[11] For a discussion of the procedures followed by IRS and the statutory basis therefor, see *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979). For a further review of the tax procedures of the type involved in this case, see *Carlson V. United States*, 580 F.2d 1365, 1368 (10th Cir. 1978).

Although plaintiff has complained of various wrongs committed by IRS, the Huntsville police, and Steven Beshears, with various references to what "they" did, it is the duty of the court to examine the evidence which is before the court against the named defendants.

FRANK W. MAGILL

Magill was the Assistant Director of the Birmingham District of IRS from 1959 until 1973. Magill served as Acting Director in the absence of the Director. In his capacity as Acting Director, Majill approved the 2644 Form approving the termination of plaintiff's tax year. This was based on the letter from Hyatt and the prior approval of three Division Chiefs. There is no evidence that Magill knew the plaintiff, bore any malice toward him, or was acting other than routinely in approving the termination. There is absolutely no evidence that

Magill conspired with other defendants or state officials as charged by plaintiff.

LEE WILLINGHAM

In July 1972, Willingham was a revenue officer in the Collection Division of the Birmingham District of IRS. He was stationed in Huntsville. After plaintiff's tax year was terminated, Willingham went to the jail where plaintiff was in custody and served the "Notice of Termination of Taxable Period" on plaintiff. He later seized plaintiff's currency, the automobile plaintiff was driving when arrested, and the guitar. He converted the currency into a cashier's check. He later released the guitar to Veronica Potter after she had shown him proof of ownership. He did not notify plaintiff of his intention to deliver the guitar to Potter; nor did he discuss Potter's "proof" with plaintiff. Willingham was not

involved in the decision to terminate plaintiff's tax year. There is absolutely no evidence that Willingham conspired with other defendants or state officials.

D.T. BAPTIST

In July 1972, Baptist was the Director of the Birmingham District of Internal Revenue. At the time the Form 2644 requesting termination was received at his office, he was absent. He neither reviewed nor approved the requested termination. There is no evidence that he directed "(t)he joint effort between the office and powers of IRS and local police to harass plaintiff . . ." There is no evidence that Baptist was personally involved in the issuance of the deficiency notice. There is no evidence that he conspired with other defendants or state officials. There is no evidence that Baptist personally initiated any

action against plaintiff, and the most that can be said is that he reasonably relied upon the recommendations of his subordinates. Some of the actions purportedly authorized by Baptist were actually taken by subordinates who used Baptist's signature by virtue of delegated authority.

CONCLUSIONS OF LAW

A review of this case must be made in light of the fact that the I.R.S. is duty bound to inquire after persons who may be liable for the payment of taxes. *Donaldson v. United States*, 400 U.S. 517, 523 (1971). Of course, this inquiry and any subsequent action must be made with due consideration for the interests protected by provisions of the United States Constitution. See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Further, inasmuch as this cause is before the

court in part upon a Motion for Summary Judgment by defendants, the court will view the record in the light most favorable to the party opposing the motion and will, therefore, draw all inferences most favorable to the plaintiff, Carl Michael Seibert. See e.g., *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); and *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980).

As noted above, although the defendants had not listed the defense of qualified immunity as a ground for their Motion for Summary Judgment, they had addressed the defense in briefs filed with the court. To avoid any question of notice as to this defense, the court advised the parties that the defense of qualified immunity would be considered on the Motion for Summary Summary Judgment. The Supreme Court of the United States and the Court of Appeals, Fifth Circuit, have

consistently held that the qualified immunity defense is proper for consideration on a Motion for Summary Judgment. See *Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); and *Gordon v. Watson*, 622 F.2d 120 (5th Cir. 1980).

WERE PLAINTIFF'S RIGHTS VIOLATED?

In the recent opinion by the Fifth Circuit Court of Appeals in the case of *Barker v. Norman*, *supra*, the court explained that while a defendant is permitted to proceed directly to the question of qualified immunity, as it is a complete defense to liability, there are two threshold issues that should be separated from the qualified immunity issue. These threshold issues are:

1. Is there a genuine issue of fact as to the objective conduct of the defendant? and,

2. Did the complained of conduct, if it in fact occurred, violate any rights of the plaintiff?[12]

The court will not address the first of these threshold issues as the facts of this action have been discussed above in depth. However, the court feels compelled to briefly address the second threshold issue inasmuch as the plaintiff in this cause has complained of alleged violations of his constitutional rights as guaranteed under the Fifth Amendment. As the court stated in *Barker, supra*, "if the complained of conduct would not as a legal matter, amount to a violation of rights secured to the plaintiff under the Constitution of the United States, then summary judgment is proper." (footnotes omitted.) 651 F.2d 1107 at 1124.

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[12] See 651 F.2d 1107, at 1123, 1124.

As earlier noted, this court has carefully considered all factual data submitted to the court with regard to this action by all parties. In light of the court's review of the submitted materials, the court can only conclude that serious doubt exists as to whether or not the complained of actions allegedly committed by defendants Baptist and Magill were such as to rise to the level of constitutional violations. *Bivens v. Six Unknown Federal Narcotics Agents, supra,* held that a "cause of action for damages" arises under the United States Constitution when Fourth Amendment rights are violated. The case of *Davis v. Passman,* 442 U.S. 228 (1979), held that a cause of action and damages remedy could be implied under the due process clause of the Fifth Amendment. It is a *Davis* type "cause of action" which the plaintiff in the case at bar has brought before this court. However, not

all alleged violations of the Fifth Amendment will support a cause of action. As earlier noted, Judge Pointer pointed out in his in-depth Memorandum Opinion in this case dated August 11, 1980:

> "(W)hile in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*.

See 594 F.2d 423, at 431. With regard to the alleged Fifth Amendment violations asserted by the plaintiff in the instant action, no "clear and direct" infringement of rights has been shown by the plaintiff. Thus, assuming the facts as given and addressed earlier in this opinion to be accurate, at least some question remains as to whether or not the participation in the complained of events by

defendants Baptist, Magill and Willingham was such as to rise to the level of constitutional violations. Even recognizing that violations of the due process clause of the Fifth Amendment may form the basis of a legal claim upon which relief may be granted, adequate provision for the safeguarding of due process and equal protection rights have been made a part of the Internal Revenue Service legislative framework by Congress pursuant to its power "to lay and collect taxes." It appears from the given facts in this action that the mandated due process safeguards were compiled with except for certain exceptions that will be discussed below.

QUALIFIED OFFICIAL IMMUNITY

The Fifth Circuit Court of Appeals held in *Barker v. Norman, supra*, that the complete affirmative defense of qualified immunity was

a third distinct issue to be dealt with. The court will now consider this issue in light of the materials before it.

In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Supreme Court extinguished the hopes of federal executive officials that they were protected by the defense of absolute immunity and held that only:

> "(A) qualified immunity is available to officers of the executive branch of Government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

See 416 U.S. 232 at 247.[13] This qualified

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[13] While *Schuer* (sic) dealt with the immunity of state officials, the official immunity doctrine in suits against federal officials for violations of constitutional rights has been held identical to the immunity doctrine applied in Section 1983 actions. See *Butz v. Economou*, 438 U.S. 478 (1978); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

immunity defense is composed of two parts: an objective part requiring reasonable grounds for the defendant's belief in the legality of the alleged unconstitutional conduct, and a subjective part requiring good faith. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Schuer* (sic) *v. Rhodes*, *supra*; *Pierson v. Ray*, 386 U.S. 547 (1967); *Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975); and *Barker v. Norman*, *supra*. This defense of qualified immunity is available to federal officers in actions against them for alleged violations of constitutional rights. See *Butz v. Economou*, 438 U.S. 478 (1978); and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2nd Cir. 1972). Several courts have applied the defense to Internal Revenue Service officials where recovery was sought based upon constitutional wrongs. See *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975);

Jetson Mfg. Co. v. Murphy, 462 F.Supp. 807 (M.D. Penn. 1978); *Terrapin Leasing Ltd. v. United States*, 449 F.Supp. 7 (W.D. Okla. 1978); *White v. Boyle*, 390 F.Supp. 514 (W.D. Va.), *aff'd.*, 538 F.2d 1077 (4th Cir. 1975). Thus, the remaining inquiry is whether the Internal Revenue officials in the instant action are protected from damages liability by qualified immunity.

To be entitled to claim official immunity, the defendant has the burden of establishing objective circumstances showing that he acted as a public official and within the scope of his discretionary authority. To meet this burden, the defendant must provide more than a bold assertion that the complained of actions were undertaken pursuant to the performance of his duties and within the scope of his discretion. "There must be a showing by competent summary judgment materials of objective

circumstances that would compel that conclusion." See *Barker*, *supra*, 651 F.2d 1107, at 1125. In *Barker*, the Fifth Circuit explained that: "(s)uch objective circumstances necessarily must encompass the factual context within which the complained of conduct took place." 651 F.2d at 1125. Further, the court stated:

> (A)lso appropriate is a showing by the defendant of facts relating to the scope of his official duites -- e.g., a showing of the circumstances through which he initially came to believe that his lawful authority included within its scope actions of the type that are complained of by the plaintiff.

651 F.2d at 1125.

This court is of the opinion that defendants Baptist and Magill[14] have submitted competent objective materials sufficient to support summary judgment in their favor.

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[14] Defendant Willingham will be discussed below.

Defendant Baptist has shown, as stated earlier, that at the times pertinent to this action, he was the Director of the Birmingham District of Internal Revenue. At the time the termination request was received at his office, he was absent. He neither reviewed nor approved the requested termination. Plaintiff has offered no evidence that Baptist directed "(t)he joint effort between the office and powers of IRS and local police to harass plaintiff . . ." There is no evidence that Baptist was personally involved in the issuance of the deficiency notice. There is no evidence that he conspired with other defendants or state officials. There is no evidence that he personally initiated any action against the plaintiff, and the most that can be said is that he reasonably relied upon the recommendations of his subordinates. In fact, some of the actions purportedly authorized by Baptist were actually

taken by subordinates who used Baptist's signature by virtue of delegated authority. Defendant Magill was the Assistant Director of the Birmingham District of Internal Revenue Service from 1959 to 1973 and served as Acting Director in the absence of the Director. In his capacity as Acting Director, he approved the 2644 Form approving the termination of plaintiff's tax year. Plaintiff has offered no evidence that defendant Magill knew the plaintiff, bore any malice toward him, or was acting other than routinely in approving the termination. There is no evidence that Magill conspired with other defendants or state officials as charged by plaintiff. From its review of the record, this court has determined that competent materials have been submitted to show that defendants Baptist and Magill were at all times acting pursuant to federal law and authority, were acting within

the scope of their official duties, performed their acts in good faith and with the reasonable belief that their actions were legal, proper and necessary. Statements made by the parties in affidavits and depositions support a conclusion that all actions by both Baptist and Magill were carried out pursuant to the performance of their official duties and within the scope of their discretionary authority.

Once the defendants have established sufficient objective circumstances evidencing that their actions were taken as public officials and within the scope of their discretionary authority, the ball then rebounds into the plaintiff's court. In *Barker*, the court stated:

> Once the defendant has established that he is entitled to claim official immunity, under *Douthit* the burden shifts to the plaintiff to establish that the immunity should be breached because either the defendant harbored a subjective malicious intent or he knew or should have known that his actions violated a clearly

> established constitutional right of the plaintiff . . . (H)e must establish that there is a genuine issue of material fact as to whether the defendant lacked "good faith" -- i.e., whether the defendant knew or reasonably should have known that he was violating the constitutional rights of the plaintiff, or the defendant maliciously intended to harm the plaintiff.

651 F.2d 1107, 1125 and 1126.

Further that:

> The first component requires the plaintiff to raise, through competent summary judgment materials, a genuine issue of fact as to what the settled law was at the time of the defendant's conduct, and whether the defendant knew or should have known that his conduct was not in conformity with that settled law . . .
>
> As to this second component of the "good faith" issue, it is the plaintiff's burden to raise a triable issue of fact as to the defendant's malicious intent once the defendant has established that he is entitled to claim official immunity because the complained-of conduct was undertaken pursuant to his discretionary authority. As a practical matter, the plaintiff may meet his burden of raising a triable

> issue of fact as to defendant's malicious intent in either of two ways: he may introduce competent summary judgment materials, or point to summary judgment materials already in the record, that would tend to prove directly that the defendant acted with subjective malice; or, he may introduce competent summary judgment materials, or point to summary judgment materials already in the record, that would tend circumstantially to prove that the defendant acted with malicious intent. (emphasis in original) (footnotes omitted).

651 F.2d 1107, 1126.

In meeting this burden, the plaintiff in this cause has offered no evidence to show that defendants Baptist and Magill acted with subjective malice or with malicious intent or that they knew or reasonably should have known that they were violating the constitutional rights of plaintiff.[15] As noted in defendants' Brief in Support of Motion for Summary Judgment,

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[15] Cf. *Weisbrod v. Donigan*, 651 F.2d 334 (5th Cir. 1981).

any attempted reliance by the plaintiff on *Laing v. United States*, 423 U.S. 161 (1976) to support his notice of deficiency argument is misplaced as *Laing* was not decided by the Supreme Court until years after the termination of the plaintiff's taxable year. *Laing* was also decided after the notice of deficiency was issued to the plaintiff. Prior to the *Laing* decision, the Internal Revenue Service had long maintained that a deficiency notice was not required in Section 6851 terminations. In fact, cases interpreting Section 6851 were in conflict with the Second and Seventh Circuits (*Irving v. Gray*, 479 F.2d 20 (2nd Cir. 1973); *Williamson v. United States*, 31 A.F.T. R. 2d 800 (7th Cir. 1971)) holding that no notice was required, and the Fifth and Sixth Circuits (*Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1972)) holding that notice was

required. Thus, plaintiff cannot use *Laing* to premise his argument that the defendants violated "clearly established" constitutional rights as required in *Butz v. Economou*, *supra*, and *Wood v. Strickland*, *supra*, for at the time of the termination of the plaintiff's taxable year, the only appellate authority was in favor of the Internal Revenue Service's interpretation of Section 6851. See *Williamson v. United States*, *supra*. It was not until 1974, after the notice of deficiency was issued, that the Fifth Circuit held that such a notice was required. See *Clark v. Campbell*, *supra*.

Therefore, without again recounting the evidence and materials in the record, the court concludes that its careful examination of the evidence does not reveal any genuine issue as to defendant's reliance upon official

qualified immunity.[16] The plaintiff has failed to establish a genuine issue of material fact as to whether Baptist and Magill knew or reasonably should have known that they were violating plaintiff's constitutional rights, or that Baptist and Magill maliciously intended to harm the plaintiff by their actions. Defendants Baptist and Magill are thus protected from liability by the complete defense of qualified immunity.

The defendant Lee Willingham has also asserted the defense of official qualified immunity to protect him as a public officer from liability for any constitutional incursions. The plaintiff's claims against Willingham, as noted earlier, are:

a. That he conspired with other defendants

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[16] For examples of the types of evidence which may tend to support a finding of malice, see *Barker v. Norman*, 651 F.2d 1107, 1126, nn. 21 and 22 (5th Cir. 1981).

and state officials to deprive plaintiff of his civil rights; and

b. That he levied on all property seized in the drug arrest by the Huntsville Police Department, seized plaintiff's father's automobile, plaintiff's guitar, currency collection and bank account. It is further alleged he seized said property before giving notice of termination, wrongfully converted plaintiff's guitar and failed to give information about the assessment or its amount and failed to examine evidence exculpating plaintiff of the I.R.S. charges of criminal activity and income therefrom.

The plaintiff has specifically alleged that subsequent to Willingham's seizure of the guitar and currency collection, defendant Willingham improperly released the seized guitar to another party and improperly disposed of the currency collection which carried an

alleged special value because of the unique nature of the collection.

With regard to all claims against Willingham except for the alleged improper release of the seized guitar and the improper disposal of the unique currency collection, summary judgment is granted on the basis of qualified immunity.[17] In July of 1972, defendant Willingham was a revenue officer in the Collection Division of the Birmingham District of the Internal Revenue Service. After the plaintiff's tax year was terminated, Willingham went to the jail where the plaintiff was in custody following his arrest and served the "Notice of Termination of Taxable Period" on plaintiff. He later seized the plaintiff's guitar and currency collection discussed above, and also the automobile which the plaintiff was

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[17] See reasoning above as to defendants Baptist and Magill.

in when arrested. He later released the guitar to a Veronica Potter after she had shown him proof of ownership.[18] He admittedly failed to notify the plaintiff of his intention to deliver the guitar to Potter; nor did he discuss Potter's "proof" with plaintiff. Regarding the currency collection, the plaintiff seeks damages for its conversion. Subsequent to its seizure, the currency collection was treated as ordinary currency worth no more than its face value and was credited to the plaintiff's 1972 tax liability based upon its face amount.[19] Willingham asserts that he had no knowledge of the fact that the currency was part of a collection or that it had any special value. However,

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[18] The value of the guitar was not credited to the plaintiff's alleged tax liability. Actual ownership of the guitar remains in dispute.

[19] Plaintiff has alleged that the currency in question carried a "special" value other than as cash at its face value.

the court's review of the record indicates that the issue of Willingham's notice as to the currency's special value may, at the very least, be a sufficient genuine issue of fact to enable this question and claim to survive a Motion for Summary Judgment.

Therefore, to the extent that the conversion type claims, based upon the seizure and subsequent disposal of the plaintiff's guitar and currency collection, are premised upon a deprivation of property without due proces (sic) of law, these claims are not dismissed and remain to be tried and are not defeated by the defense of qualified immunity. The qualified immunity defense protects Willingham from the claims that he conspired with other officials, that he wrongfully served the "Notice of Termination of Taxable Period" on the plaintiff, and that he wrongfully seized the aforementioned property, because Willingham has submitted

sufficient objective evidence, unrebutted by the plaintiff, to establish that he acted without malice or subjective intent and that he acted reasonably and in good faith within the scope of his discretionary authority. But, notwithstanding the partial applicability of the immunity defense, the alleged claims of deprivation without due process must stand.

DEFENSE OF ABSOLUTE IMMUNITY

In light of the cases cited above in the court's discussion of the defense of qualified immunity and in light of the court's conclusion as to the application of that defense to the parties in this action, the court will not address the defendant's assertion of absolute official immunity. There may be merit to these claims by Baptist and Magill.

STATUTE OF LIMITATIONS

The defendants have claimed entitlement

to dismissal on the ground that the cause of action is barred by a one-year statute of limitations. See Alabama Code § 6-2-39 (1975). The court has previously alluded to this issue with regard to defendant Frank McCammon who was dismissed as a defendant by order of this court entered December 4, 1981.[20] While this memorandum opinion and order dismissing Frank McCammon issued by this court did not mention the statute of limitations question, the court has determined since the entry of that order that any claim against McCammon by the plaintiff was clearly barred by the one-year limitations period. However, the court has reached this conclusion only with regard to defendant McCammon. In light of the court's finding that the defense of qualified official immunity completely protects defendants Baptist and

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[20] See footnote 3 *supra*.

Magill from liability and partially protects defendant Willingham from liability, the court does not deem it necessary to address this issue further as to those claims dismissed against the three defendants. However, with regard to the conversion type claims against defendant Willingham alleging a denial of due process in the deprivation and disposal of the plaintiff's personal property, the court concludes that the six-year limitations period found in Alabama Code § 6-2-34 (1975) is applicable. In characterizing these claims for the purpose of selecting the appropriate statutory period, the court finds these claims to be most analogous to a common law action for conversion of personalty to which the six-year limitation period is proper.[21]

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[21] Alabama Code § 6-2-34 (1975) provides in pertinent part that actions for the detention or conversion of personal property must be commenced within six years.

CONCLUSION

The court notes that the claims addressed in this memorandum opinion are only a few of many originally filed in this action. The court has carefully examined all submitted materials in a light most favorable to the plaintiff as to all claims against the named defendants. Nonetheless, the court has determined that the plaintiff has offered little more than his own subjective belief that the defendants in this action maliciously intended him harm. No sufficient objective facts in support of the plaintiff can be found in the record to raise a triable issue of fact as to whether or not the defendants were acting within the confines of their qualified good faith immunity from liability. While the plaintiff may harbor a sincere belief that the defendants maliciously intended to injure him

via the exercise of their power as officials with a powerful agency of our government, he has failed to "articulate any objective circumstances that could serve as a rational basis from which a fact-finder could infer that the defendant acted out of malice rather than duty." See *Barker v. Norman*, 651 F.2d 1107, at 1127 (1981). This court recognizes that judgmental mistakes may be made by men in the exercise of their discretionary authority and duty. However, the court is mindful of the following statement by the Supreme Court found in *Butz v. Economou*:

> "Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law."

Butz v. Economou, 438 U.S. 478, at 507 (1978). The Supreme Court also stated in *Butz*, that, "damages suits concerning constitutional violations need proceed to trial, but can be terminated on a properly support motion for

summary judgmeny (sic) based on the defense of immunity." 438 U.S. 478, at 508.

Therefore, defendants' Motion for Summary Judgment is due to be granted in full as to defendants Baptist and Magill, and is due to be granted in part as to defendant Willingham.

An order in accordance with this memorandum opinion will be entered contemporaneously herewith.

This the 8th day of January, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT, Plaintiff,	)	
v.	)	CIVIL ACTION NO.: CV77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants.	)	

ORDER

Plaintiff's Motion for Reconsideration of Order of January 8, 1982 Based on Newly Discovered Evidence and Mistake filed February 4, 1982 is DENIED.

DONE and ORDERED this 10th day of February, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This cause comes on to be heard on Plaintiff's Motion for Reconsideration of Order of January 8, 1982 Based on Newly Discovered Evidence and Mistake filed February 4, 1982.

This court has previously entered memorandum opinions and contemporaneous orders granting summary judgment motions of defendants Baptist, Magill and McCammon who were dismissed as parties defendant.

As to defendant McCammon, the court primarily determined that there was no evidence of any constitutional deprivation.

As to defendants Baptist and Magill, the court primarily held that the actions against them were due to be dismissed because of their unrebutted claims of qualified immunity.

In view of these determinations, the court did not deem it necessary to specifically address the statute of limitations defenses as to these defendants. The court has determined that, in the event of an appeal of the final judgment in this case, all matters should be before the appellate court on the previous appeal.

The court discussed the statute of limitations defenses in a memorandum opinion entered August 4, 1981. The court hereby adopts the discussion in that memorandum opinion and supplements its memorandum opinions with regard

to Baptist, Magill and McCammon.

The court holds that there is no evidence of any continuing conspiracy directed toward plaintiff and that the acts complained of against Baptist, Magill and McCammon culminated more than one year prior to the filing of this action. If there was a wrongful termination, it was complete at the time the action was taken. If there was a constitutional violation in failing to give notice of the deficiency, this violation also culminated more than one year prior to the filing of this action. Thus, the court will deny plaintiff's motion.

The court further notes that the motion and attached affidavits were filed by plaintiff two days after a jury had been selected for the trial of the remaining issues in this case and on the date specifically set for trial after the case had been pending over four years.

This the 10th day of February, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT, Plaintiff,	)	
v.	)	CIVIL ACTION NO.: CV-77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants.	)	

JUDGMENT

This action came on for trial on February 4, 1982, before the Court and a jury, Honorable Robert B. Propst, United States District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict, and this Court having previously entered its Order of January 8, 1982, granting the Motions for Summary Judgment of defendants Baptist and Magill, and having previously entered its Order of December 4, 1981, granting

the Motion for Summary Judgment of defendant McCammon, it is

ORDERED and ADJUDGED that plaintiff take nothing, that the action be dismissed with prejudice on the merits as to all defendants, and that all parties are to bear their own costs of action.

Dated at Birmingham, Alabama, this 17th day of March, 1982.

(s) ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE
ROBERT B. PROPST

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	CV77-PT-0951-NE
	)	
LEE WILLINGHAM,	)	
	)	
Defendant.	)	

ORDER

This case is before the court upon plaintiff's Motion for Judgment Non Obstante Veredicto or, in the Alternative, Motion for New Trial, as supplemented. The court has previously considered all the matters raised and has reconsidered them on this motion.

For additional cases having a possible bearing on the case the court calls attention to *Myers v. United States*, 647 F.2d 591 (5th Cir. 1981); and *Nathan Rodgers Construction & Realty Corp. v. City of Saraland*, No. 80-7670 (5th Cir. 1982).

The Motion for Judgment Non Obstante Veredicto or in the Alternative, Motion for New Trial, as supplemented, is hereby DENIED.

DONE and ORDERED this 22nd day of March, 1982.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARL MICHAEL SEIBERT, Plaintiff-Appellant,	)	
v.	)	No. 82-7163
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

IT IS ORDERED that the motion of appellant to allow submission of appendix to the petition for rehearing and suggestion for en banc consideration is denied.

(s) PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE
PHYLLIS KRAVITCH

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff-Appellant,	)	
	)	NO. 82-7163
v.	)	D.C. Docket No.
	)	CA77-PT-0951-NE
D.T. BAPTIST, District Director of Internal Revenue, et al.,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of Alabama

(May 27, 1983)

Before KRAVITCH and JOHNSON, Circuit Judges,

and LYNNE*, District Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

ISSUED AS MANDATE: Sept. 14, 1983

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*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARL MICHAEL SEIBERT, Plaintiff-Appellant,	)	
versus	)	No. 82-7163
D.T. BAPTIST, District Director of Internal Revenue, et al., Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of Alabama

(August 11, 1983)

ORDER:

IT IS ORDERED that the petition for rehearing and suggestion for en banc consideration is denied.

(s) PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE
PHYLLIS KRAVITCH

APPENDIX M

CONSTITUTIONAL PROVISIONS

Article III, § 2 of the United States Constitution, provides in pertinent part, that:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . (and) to all cases affecting . . . public ministers and consuls; . . . all cases . . . (in) controversies to which the United States shall be a party. . .
>
> In all the other cases before mentioned, the supreme court shall have appellate jurisdiction both as to law and fact, . . .

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

> . . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX N

STATUTES AND REGULATIONS INVOLVED

Section 6201 (Assessment authority) of Title 26 of the United States Code provides in pertinent part, that:

> (a) Authority of Secretary. — The Secretary is authorized and required to make inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

Section 6212 (Notice of deficiency) of Title 26 of the United States Code provides in pertinent part, that:

> (a) In general. — If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, 44, 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Section 6213 (Restrictions applicable to deficiencies; petition to Tax Court) of Title

26 of the United States Code provides in pertinent part, that:

> (a) Time for filing petition and restriction on assessment. — Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court until the decision of the Tax Court has become final. Notwithstanding the provisions of section7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Section 6331 (Levy and distraint) of Title 26 of the United States Code provides in pertinent part, that:

(a) Authority of Secretary or delegate. — If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeoparty, notice and demand for immediate payment of such tax may be made by the Secretary or his delegeat and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. — The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he

may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures. — Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary of his delegate may thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

Section 6851 (Termination of taxable year) of Title 26 of the United States Code provides in pertinent part, that:

(a) Income tax in jeopardy. —

(1) In general. — If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the proceeding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the

> taxpayer, together with a demand for immediate payment of the tax for the taxable period so delcared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

Section 6861 (Jeopardy assessments of income, estate, and gift taxes) of Title 26 of the United States Code provides in pertinent part, that:

> (a) Authority for making. — If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency letters. — If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

(c) Amount assessable before decision of Tax Court. — The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary or his delegate may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid protion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary or his delegate shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

Section 7421 (Prohibition of suits to restrain assessment or collection) of Title 26 of the United States Code provides in pertinent

part, that:

> (a) Tax. — Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

APPENDIX O

Internal Revenue Manual Supplement (May 19, 1971) Termination of Taxable Periods Under Section 6851, provides in pertinent part, that:

Section 1. Purpose

This provides revised instructions and procedures for recommending, approving and effecting termination of taxable periods under IRC 6851, based on Policy Statement P-4580-3 (same as P-5210-2 and P-5(12)30-2.

Section 2. Background

.01 This office has become increasingly aware of the diverse practices of the field offices in handling cases involving termination of taxable years under section 6851. In many instances, *it appears that action is taken by a district office when it is advised by a local law enforcement agency of the existence of money or other property seized from a taxpayer after his arrest for State or Federal violations. Upon learning of the existence of such assets, the tax period is closed and an assessment in the amount of the available assets is made.* Thereafter, some offices have been handling the assessment under *section 6861* of the Internal Revenue Code relating to jeopardy assessments, and other offices have been handling the assessment under section 6201 of the Code. (emphasis added)

.02 Departing alien procedures are already provided in IRM 4299 and IRM 5(15) 6(11).

Section 3. Requirements

.01 *Termination of taxable year and assessment must be used sparingly and care taken to avoid excessive and unreasonable assessments.* They should be limited to amounts which reasonably can be expected to equal the ultimate tax liability for the terminated period. Therefore, *a termination of taxable year and assessment must be personally approved by the District Director* or the Director of International Operations. If none of the following conditions exist, then prior approval must be secured from the Director, Audit Division (CP:A:P): (emphasis added)

1. The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself.

2. The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.

3. The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty or interest.)

Section 4. Assessment Procedures at Termination

.01 The determined tax resulting from the IRC 6851 termination is assessed under IRC 6201 and levy action taken under IRC

6331(a) after notice and demand and where appropriate without regard to the 10-day period. No statutory notice of deficiency will be issued for the short period.

Section 6. Procedures After Termination

.06 These cases will be subject to the same post review procedures as Jeopardy Assessment cases, IRM 4875.

Internal Revenue Manual:(Document MT 4500-129 (9-15-71)): paragraph 4584.3, Potential Criminal Cases, provides that:

> Jeopardy assessments will be withheld in potential criminal tax cases to the extent necessary to avoid imperiling successful investigation or prosecution of such cases. On the other hand, when such action is warranted in those cases, it must be taken whenever it is feasible to do so. The District Director is responsible for this practice when jeopardy assessment recommendations are submitted to him for approval.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)): paragraph 4584.4, Responsibility for Recommending Jeopardy Assessments, provides that:

> (1) Audit Division is responsible for all recommendations for jeopardy assessments in cases under active consideration

in Audit. Questions arising may be referred to the National Office, Attention: CP:A:P.

(2) Intelligence Division is responsible for all recommendations for jeopardy assessments in any case under active consideration by Intelligence and for jeopardy assessments in cases under joint active consideration by Intelligence and Audit.

(3) Collection Division is responsible for recommendations for jeopardy assessments in any case in which collection of the tax would be jeopardized by delay, except those cases under active consideration by Audit or Intelligence. If Collection receives or develops information on cases under active consideration by Audit or Intelligence indicating that collections will be jeopardized by delay, the Chief, Collection Division, furnishes a report thereof to the appropriate division.

(4) If, during Appellate Division consideration of a case, it is determined that a jeopardy assessment may be advisable, a memorandum setting forth the facts in the case is forwarded to Audit. In these cases the responsibility for recommending jeopardy assessments lies with Audit. (See IRM 4584.9)

(5) Although the basic responsibility for recommending jeopardy assessments will be as provided herein, this does not preclude any other division from submitting pertinent information regarding the matter to the responsible division for consideration.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)): paragraph 4584.5, Prima Facie Jeopardy Cases, provides that:

> (1) Certain conditions and circumstances can properly be considered as establishing prima facie cases in which jeopardy assessments should be made. Examining officers investigating taxpayers of the types in (2) below will prepare separate reports, (except in joint investigation cases), containing specific recommendations for or against jeopardy assessments setting forth the facts and circumstances upon which such recommendations are based. If a jeopardy assessment is deemed warranted prior to completion of the report of investigation, the facts and circumstances relative to jeopardy will be covered in a separate report in sufficient detail so that designated officers in Audit Division can make a decision on the merits of the recommendation.
>
> (2) The types of cases are as follows:
>
> (a) Cases involving well-known, major operators in the criminal fiels, irrespective of present financial condition. This is due to the fact that these individuals by the very nature of their business activity are in such position that their financial condition could change at any time without warning.
>
> (b) Individuals generally known to frequently wager large amounts. In these cases the loss of a single bet might reduce the taxpayer to insolvency; this is especially true if his assets consist largely of cash.

(c) Individuals engaged in taking wagers, irrespective of whether major, secondary or minor operators. Although taxes in these cases might not be in jeopardy to the same extent as in cases under (b), nevertheless, a series of losses could absorb all of the taxpayer's assets.

(d) Individuals engaged in other activities generally regarded as illegal where there are possibilities of large unexpected losses or interference with their business or activity by others of the criminal element such as hijackers, blackmailers, etc.

(e) Individuals with a background and history of activity in illegal enterprises such as gambling, bootlegging, narcotics, etc., who are presently engaged in so-called legitimate business ventures. Such individuals must be considered a poor risk by the very nature of their activities and probable associations with the racketeer elements.

(f) Taxpayers engaged in legitimate business but who are consistently suffering business or personal losses.

(g) Taxpayers against whom large damage suits are pending or against whom such suits are threatened.

(h) Taxpayers who have a past record for resisting or avoiding payment of their taxes.

(i) Taxpayers known or suspected of having plans for leaving the United States without making provision for payment of their taxes, with particular attention being given to aliens generally considered as border hoppers.

(j) Other taxpayers where the facts and circumstances indicate that the taxpayer's present financial condition or future possibilities are such as to make collection of the tax doubtful.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)) paragraph 4584.6, Examiners' Reports, provides in pertinent part, that:

(1) Evidence indicating jeopardy and information regarding the taxpayer's financial condition should be developed to the maximum extent so that all possible information which should be considered in determining whether a jeopardy assessment is proper will be available to the Chief, Audit Division, for consideration in connection with his technical review of the case before referral to the District Director for approval.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)) paragraph 4584.7, Recommendation Procedure for Jeopardy and Quick Assessments, provides that:

(1) When it is determined that collection will be jeopardized by delay if regular assessment and collection procedures are followed, a recommendation for jeopardy assessment will be made by the responsible division as provided in IRM 4584.4. Form

2644 (Recommendation for Jeopardy Assessment Recommendation for Termination Assessment) is provided for this purpose. A separate Form 2644 in triplicate will be prepared for each taxpayer in cases involving transferor-transferee liability or assessment of 100 percent penalty as provided in IRC 6672. In addition, Form 2645 (List of Property Belonging to Taxpayer) should be prepared to the extent practicable, setting forth the property of the taxpayer.

(2) Upon completion by the responsible division, the complete file relating to the proposed jeopardy assessment shall be referred for concurrence or comment to the Chief, Colelction Division, and then to the Chief, Audit Division, and finally to the District Director, for approval. The review by Colelction will ensure that the most qualified people will determine whether collection of the tax is in jeopardy. Because of the urgency usually involved in jeopardy assessment cases, the file will be given the highest priority of handling within and between the various divisions.

(3) If a recommendation for a jeopardy assessment is received from another organizational unit of the Service, the Treasury Department or Justice Department, the recommendation will be transmitted to the Chief, Audit Division, who will ascertain the status of the case. If the information shown on the recommendation is too general and vague to support a jeopardy assessment, the recommendation will be assigned to a revenue agent or special agent, as

the case may be, to develop as expeditiously as possible the facts necessary for approval or disapproval. Any such oral recommendation received must be confirmed in writing prior to referral to the District Director for his approval or disapproval.

(4) If the recommendation is approved, either by the District Director, or Director, Audit Division, National Office, the file will be transmitted to the service center, Accounting and Research Division, for jeopardy assessment. After assessment has been accomplished, the service center returns the file with the two copies of Form 2644 to Review Staff for further administrative action. The original Forms 2644 and 2645 are retained by the service center.

(5) Quick assessments may be requested using Form 2859 (Request for Quick or Prompt Assessment). Form 2859 is usually prepared in quadruplicate. Original and one copy are sent to the service center, one copy is retained by preparer, and in bankruptcy cases one copy is sent to Special Procedures Staff in Collection Division. (See IRM 4583.2)

(6) Telephone requests for jeopardy or quick assessments may be made to the service center when warranted. (See ADP Handbook 342-738.03 6 for service center procedure.) Such telephone requests must be followed promptly with properly approved Forms 2644 or 2859, as appropriate. When a jeopardy or quick assessment is requested by telephone, the following information

must be furnished:

(a) Affirmative statement in jeopardy case that District Director has approved Form 2644.

(b) Name, address, and EIN or SSN of taxpayer.

(c) Type of tax.

(d) Taxable period.

(e) Amount of tax, penalty, and interest to be assessed.

(f) Amount of payment, if any, and balance due.

Internal Revenue Manual: (Document MT 4500-129 (9-15-71)) paragraph 4584.8, Immediate Review and Issuance of 90-Day Letters, provides in pertinent part, that:

> (1) Immediately after assessment, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. *It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.* (emphasis added)
>
> (2) Jeopardy assments made by the Office of International Operations will be immediately reviewed by the National Office Audit Division, (CP:A:P).

Internal Revenue Manual: (Document MT

4500-129 (9-15-71)): paragraph 4585, Termination of Taxable Period under IRC 6851, provides in pertinent part, that:

¶ 4585.1 Statutory Basis

(1) IRC 6851 specifically applies when the taxable year of a taxpayer has not ended, and also when the taxable year has ended but the due date for filing the return has not arrived.

(2) Assessments under IRC 6851 are not in a technical sense jeopardy assessments. *Nevertheless, the review procedures in IRM 4584.8 relating to jeopardy assessments apply also to assessments under IRC 6851,* except with respect to departing aliens (see IRM 4299). (emphasis added)

(3) IRC 6658 provides that in addition to all other penalties, a penalty of 25 per centum of the total amount of the tax or deficiency in tax may be added as a part of the tax for violations or attempts to violate the provisions of IRC 6851.

¶ 4585.2 Procedures for Terminating Taxable Period

(1) *Termination of taxable year and assessment must be used sparingly and care taken to avoid excessive and unreasonable assessments. They should be limited to amounts which reasonably can be expected to equal the ultimate tax liability for the terminated period. Therefore a termination of taxable year and assessment must be personally approved by the*

District Director or the Director of International Operations. Prior approval must be secured from the Director, Audit Division (CP:A:P), if none of the following conditions exist: (emphasis added)

(a) The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself.

(b) The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.

(c) The taxpayer's financial solvency is or appears to be imperiled. (This does not include cases where the taxpayer becomes insolvent by virtue of the accrual of the proposed assessment of tax, penalty and interest.)

(2) It is recognized that due to the many conditions and factors having a bearing upon recommendations for termination of taxable year and assessments no specific rules can be established for preparing reports in support thereof in every case. However, the following information should be submitted in all cases to the extent practicable:

(a) Name and address of taxpayer.

(b) Tax and penalty to be assessed by periods.

(c) The nature of the taxpayer's business or activity.

(d) The taxpayer's present financial condition.

(e) Information regarding the taxpayer's activity giving rise to the recommendation, such as transfer of assets

without consideration.

(f) Record with respect to continuing business or personal losses.

(g) Filing record of taxpayer.

(h) The taxpayer's record for resisting payment of taxes in the past. (Collection delays and unpaid taxes.)

(i) The nature and location of the taxpayer's assets and the source of his income.

(j) Any other information having a bearing upon the taxpayer's financial condition, future prospects for losses, etc.

(3) *An assessment made as a result of termination of taxable period must be based on a reasonable computation of tax liability. An assessment equal to the amount of money or other valuable property held by a person at the time of arrest is not considered a reasonable computation unless supported by other facts.* (emphasis added)

(4) A recommendation that the 25% penalty provided by IRC 6658 be added to the tax must be based on the fact that the taxpayer performed, or attempted to perform an act or acts tending to prejudice or to render wholly or partially ineffectual proceedings to collect income tax made due and payable by virtue of IRC 6851. (See Rev. Rul. 68-96, C.B. 1968-1. 566.)

(5) The basis on which the adjusted gross income was computed will be stated. This will be an acceptable legal basis (for example, a source and application of funds statement or net worth computation). All known assets, liabilities, income and

expenses will be considered. A reasonable estimate will be made of expenses, if appropriate, as for example in connection with a net worth computation. Also:

(a) Cost of living expenses whould include professional estimates by a narcotics agent (or other expert) as to the "Cost of Habit" for a narcotics addict.

(b) Estimates of income from the sale of narcotics should be supported, if possible, by testimony from a narcotics agent (or other expert) who may have knowledge of the subject's activities.

(c) Estimates of income from illegal gambling, including "gross take" and "payoffs" may be support by testimony of law enforcement officers who are familiar with the gambler's operations. Efforts should be made to obtain similar testimony in cases involving other illegal activities.

(d) The taxpayer should be interviewed, if feasible, preferably before assessment is made, in order to afford him an opportunity to explain questioned assets, liabilities, income or expenses, filing history, etc. Such an interview may also be of value in revealing previously unknown assets, liabilities, income or expenses.

(e) Efforts should be made to locate and examine books and records, if any, of the taxpayer to the extent possible in the available time.

¶ 4585.3 Assessment procedures at Termination of Taxable Period

(1) The determined tax resulting from the IRC 6851 termination is assessed under

IRC 6201 and levy action taken under IRC 6331(a) after notice and demand and if appropriate without regard to the *10 day period*. No statutory notice of deficiency will be issued for the short period. (emphasis added)

(2) "Substitute for return" procedures in IRM 4562.4 will be followed. These are not applicable to issuance of statutory notices.

(3) Notice of Termination of Taxable Period (Pattern Letter P-49) (Exhibit 4580-1) is prepared in triplicate and dated as of date presented or mailed to the taxpayer. It is usually prepared in Audit Division. Review Staff, at the time Form 2644 (Recommendation for Jeopardy Assessment/Recommendation for Termination Assessment) is approved and sent to Collection Division for demand and immediate payment of the tax for the taxable year terminated and demand for immediate payment of any tax for the preceding year as remains unpaid. To avoid delays, it may be necessary to request preparation and approval of Form 2644 by telephone. Notice of Termination of Taxable Period should be delivered personally to the taxpayer. The taxpayer should be advised that IRC 443 requires that he file a return for the terminated taxable period. If the taxpayer cannot be located or personal service cannot be accomplished within the time limitations imposed by the circumstances, the notice may be sent be certified mail, return receipt requested, addressed to the taxpayer's last known addressed. The tax for the terminated period will then be

promptly assessed and will be followed by a notice and demand.

APPENDIX P

Section 1331 (Federal question; amount in controversy; costs) of Title 28 of the United States Code provides in pertinent part, that:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Section 2201 (Creation of remedy) of Title 28 of the United States Code provides that:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 (26 USCS § 7428), any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal regulations of any interested party seeking such declaration, shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202 (Further relief) of Title 28 of the United States Code provides that:

Further necessary or proper relief based on a delcaratory judgment or decree may be granted after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX Q

Section 1983 (Civil action for deprivation of rights) of Title 42 of the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and alws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 of Title 42 of the United States Code provides in pertinent part, that:

> (3) Depriving persons of rights or privilages. (sic) If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all person within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen

> who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, thereby another is injured in his person or property, or deprived of having and exercising any irght or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986 (Same; action for neglect to prevent) of Title 42 of the United States Code provides that:

> Every person who, having knowledge that any of the wrongs, conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages

may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for teh benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

APPENDIX R

The Federal Rules of Civil Procedure, Rule 26, General Provisions Governing Discovery, provides in pertinent part, that:

> (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.
>
> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim of defense of any other party, including the existence description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making

it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The Federal Rules of Civil Procedure, Rule 33, Interrogatories to Parties, provides that:

> (a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.
>
> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or

other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquiried into under Rule 26(b), and the answers may be used to the extend permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involved an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation. abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the

records from which the answer may be ascertained.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.

The Federal Rules of Civil Procedure, Rule 34, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes, provides in pertinent part, that:

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procdure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the reques may move for an order under Rule 37(a) with respect to any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

The Federal Rules of Civil Procedure, Rule 56, Summary Judgment, provides in pertinent part, that:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declatory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought hsall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgmetn, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages.

No. 83-807

In the Supreme Court of the United States

OCTOBER TERM, 1983

CARL MICHAEL SIEBERT, PETITIONER

v.

D. T. BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this action for damages against three IRS officials, contending that certain tax assessment and levy procedures violated his constitutional rights. The court of appeals affirmed an award of summary judgment in favor of respondents, holding them entitled to a defense of qualified immunity. Petitioner challenges that holding, making essentially the same arguments proffered by the petitioner in *Hall* v. *United States*, No. 83-514, in which certiorari was denied on November 28, 1983.

1. The pertinent facts may be summarized as follows: On July 7, 1972, petitioner was arrested on drug-related charges by Alabama state police (Pet. App. A4). The police seized the car petitioner was

driving and its contents, including a guitar and $460 in cash (*id.* at A4, F16). The police also seized $2,000 discovered in a search of petitioner's room at his parents' home (*id.* at F18).

Three days later, respondent Magill, as Acting District Director of Internal Revenue in Birmingham, Alabama, determined that petitioner's involvement in drug activities "tend[ed] to prejudice or to render * * * ineffectual proceedings to collect [his] income tax for the current * * * taxable year," within the meaning of Section 6851(a)(1) of the Code.[1] In accordance with that Section, Magill terminated petitioner's 1972 taxable year and declared his income tax for the first seven months of the year "immediately due and payable." Magill assessed a tax of $6,458 for that period, basing the assessment on an estimate of petitioner's earnings from drug sales (Pet. App. F22-F23).

Respondent Willingham, an IRS collection officer, served petitioner with the notice of termination and with a notice of levy under Code Section 6331(a) (Pet. App. F26). The latter notice informed petitioner that the property impounded by the Alabama police was being seized in partial satisfaction of the unpaid tax assessment (*id.* at A4-A5, F19-F20).[2] A notice of deficiency for the tax period at issue was sent to petitioner in August 1974, about two years later (*id.* at A5, F14). That notice was approved by respondent Baptist, the District Director of Internal Revenue in Birmingham (*id.* at F27-F28). Baptist

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Upon a later determination that the car was owned by petitioner's father, it was released (Pet. 9).

was absent from his office when the notices of termination and levy were served and took no part in their issuance (*id.* at F17).

Petitioner brought this action for damages in the United States District Court for the Northern District of Alabama, contending that respondents' enforcement of the Code's termination and levy procedures violated his constitutional rights (Pet. 15). His chief allegations were that respondents had conspired with the Alabama police "to interfere with [his] civil rights" (42 U.S.C. (& Supp. V) 1985), and that the IRS's failure to send him a notice of deficiency before terminating his tax year and levying on his property violated the Fifth Amendment (Pet. App. F44-F46). He also alleged violations of (and conspiracies to violate) the Fourth, Sixth, Eighth, and Fourteenth Amendments (Pet. 15).

The district court awarded summary judgment in favor of respondents (Pet. App. E1-E4, F1-F2). While expressing "serious doubt" that any of their actions violated the Constitution (*id.* at F32), the court held that they were entitled in any event to a defense of qualified immunity. It found that Magill, in "routinely * * * approving the termination [notice]" (*id.* at F25), and Baptist, in approving the notice of deficiency "upon the recommendations of his subordinates" (*id.* at F39), were acting within the scope of their duties in a good faith belief that their actions were proper (*id.* at F40-F41). It found that Willingham, in serving the notices and effecting the levy, was likewise acting "in good faith within the scope of his discretionary authority" (*id.* at F51).[3] It found that petitioner had introduced "no

[3] The court declined to grant summary judgment on the question whether Willingham, after seizing petitioner's guitar

evidence to show that [respondents] acted with subjective malice" (*id.* at F43, F25-F27, F39-F40, F51), "no evidence to show that [respondents] knew or reasonably should have known that they were violating [his] constitutional rights" (*id.* at F43, F46, F48 n.17), and "absolutely no evidence" to show that respondents had conspired with each other or with state officials to deprive him of his civil liberties (*id.* at F25-F26, F27-F28). The district court accordingly held that respondents were entitled to qualified immunity under *Wood* v. *Strickland*, 420 U.S. 308 (1975), and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).[4] The court of appeals affirmed in an unpublished judgment order (Pet. App. K1).

2. The courts below correctly applied the principles of qualified immunity to the facts of this case. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982),[5] this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitu-

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and "currency collection," had improperly disposed of them, holding that this question might raise a genuine issue of material fact (Pet. App. F48-F50). This question was subsequently decided against petitioner at trial (*id.* at H1-H2) and he does not pursue it here.

[4] The district court also dismissed petitioner's claim against Frank McCammon, an IRS official, holding that McCammon's alleged rudeness and refusal to investigate other taxpayers on petitioner's request did not violate his constitutional rights (Pet. App. E2-E3), and denied petitioner's motion to add Frank Hyatt, another IRS official, as a party defendant (*id.* at D1). Petitioner does not appear to seek review of these holdings.

[5] *Harlow* was decided after the district court's decision in this case, but before the court of appeals' affirmance.

tional rights of which a reasonable person would have known." 457 U.S. at 818. In July 1972, when the actions of which petitioner complains occurred, a taxpayer had no "clearly established right," under either the Internal Revenue Code or the Due Process Clause, to receive a notice of deficiency before termination or levy procedures were invoked against him. The only court of appeals that had considered the statutory question as of July 1972 had held that the Code afforded no such right,[6] and the district courts in the other circuits were divided.[7] In 1976, this Court interpreted Section 6851 (on analogy with Section 6861, governing jeopardy assessments) to require that the IRS send a deficiency notice to a taxpayer within 60 days after making a termination assessment and before selling the taxpayer's property. *Laing* v. *United States*, 423 U.S. 161 (1976). The Court reached that result, however, by a 5 to 3 vote, following reargument of the case, and after noting that it had granted certiorari to resolve what by then had become a conflict among the circuits on the question. 423 U.S. at 167, 169. Under these circumstances, it can scarcely be contended that petitioner in July 1972 had a "clearly established statutory right" to receive a notice of deficiency before the IRS levied on his guitar.[8]

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[6] *Williamson* v. *United States*, 31 A.F.T.R.2d (P-H) ¶ 73-456 (7th Cir. 1971).

[7] Compare, *e.g.*, *Irving* v. *Gray*, 344 F. Supp. 567, 571-572 (S.D.N.Y. 1972), aff'd, 479 F.2d 20 (2d Cir. 1973) (holding that a deficiency notice was not required), with *Schreck* v. *United States*, 301 F. Supp. 1265, 1267-1268, 1284 (D. Md. 1969) (holding that a deficiency notice was required).

[8] Since there was no "clearly established statutory right" at play in this case, the question of what effect the violation of

A taxpayer's right under the Due Process Clause to receive a notice of deficiency in these circumstances, furthermore, was even more speculative. No court had decided that question as of July 1972.[9] The only court to decide it subsequently has held that no such right exists.[10] And this Court specifically reserved the question in *Laing*.[11]

In short, because neither the statutory nor the constitutional law on the subject was "clearly established" at the time in issue, respondents under *Harlow* were plainly shielded from liability for civil dam-

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such a right would have on the assertion of a qualified immunity defense to a constitutional *Bivens* claim is not presented here. Cf. *Davis* v. *Scherer*, Nos. 82-5813 and 83-3034 (11th Cir. June 30, 1983), prob. juris. noted, No. 83-490 (Dec. 12, 1983).

[9] But cf. *Schreck*, 301 F. Supp. at 1281 (suggesting, without deciding, that failure to send a deficiency notice in termination situations "raises constitutional questions of equal protection and due process").

[10] *Laing* v. *United States*, 364 F. Supp. 469, 471 (D. Vt. 1973), aff'd, 496 F.2d 853, 854 (2d Cir. 1974), rev'd on other grounds, 423 U.S. 161 (1976). But cf. *Rambo* v. *United States*, 492 F.2d 1060, 1065 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976) (suggesting that failure to send a deficiency notice in termination situations "could very well raise" due process questions).

[11] 423 U.S. at 183-184 n.26. Compare *id.* at 187 (Brennan, J., concurring) (suggesting that Section 6851(a)(1) "falls short * * * of meeting due process requirements") with *id.* at 206 (Blackmun, J., dissenting) (concluding that due process does not require a deficiency notice in termination situations because "the taxpayer has a variety of remedies to test the validity of the Commissioner's action"). See *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (1931) (holding that the Constitution does not require a prepayment forum to adjudicate tax disputes).

ages. Even if some court should eventually hold that Magill, in approving the termination assessment, and Baptist, in not issuing a notice of deficiency until August 1974, violated petitioner's due process rights, neither respondent could "reasonably be expected to [have] anticipate[d such] subsequent legal developments, nor could [they] fairly be said to [have] know[n] that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818; *Hall* v. *United States*, 704 F.2d 246, 250 (6th Cir. 1983), cert. denied, No. 83-514 (Nov. 28, 1983). Similarly, the record here is barren of evidence that Willingham failed to follow prescribed procedures in serving the termination and levy notices, or otherwise violated any of petitioner's constitutional or statutory rights. The court of appeals thus correctly affirmed the district court's determination that respondents were entitled to a defense of qualified official immunity.

3. Petitioner asserts (Pet. 26-30) that respondents violated his rights by ignoring provisions of the Internal Revenue Manual which, on his view, required IRS personnel to send a deficiency notice to a taxpayer within 60 days after terminating his tax year. This contention is unfounded. The Manual as it then existed (see Pet. App. 011) did provide that IRS personnel should follow the same internal review procedures in making jeopardy and termination assessments. Administration (CCH) Internal Revenue Manual ¶ 4585.1(2) (1972). The Manual, however, did not require that a notice of deficiency be issued in termination cases; it enjoined that requirement only in jeopardy cases, simply tracking the language of Section 6861(b) as then in effect. Compare Administration (CCH) Internal Revenue Manual ¶ 4585.1(2) (1972) with *id.* at ¶ 4584.8.

4. Petitioner's contention (Pet. 19-32) that the district court misallocated the burden of proof as to qualified immunity is beside the point, since the trial judge found that petitioner's allegations were unsupported by *any* evidence sufficient to raise a triable issue of material fact. Respondents demonstrated that they had acted in subjective good faith and that they had no reason to believe that their actions violated any "clearly established rights" of petitioner (Pet. App. F40-F41, F51). The district court accorded petitioner (*id.* at F41-F43, F51) the opportunity to present competent summary judgment materials demonstrating a genuine issue of material fact on these questions. Viewing these materials in the light most favorable to petitioner (*id.* at F15), the district court concluded that he had failed to meet this burden (*id.* at F43-F46) and properly awarded summary judgment to respondents under Fed. R. Civ. P. 56(c).

5. Petitioner makes a number of miscellaneous contentions, all of which are frivolous. His assertion (Pet. 32) that the district court erroneously held the instant action barred by the statute of limitations is wrong and, in any event, is irrelevant since the court ruled against him on the merits. His discussion (*id.* at 42-45) of 42 U.S.C. 1985 and 1986 is likewise irrelevant, since the district court found that he had introduced "absolutely no evidence" of conspiracy (Pet. App. F25). And his charge that discovery was unduly curtailed (Pet. 46-51) is groundless, since the district court afforded him liberal discovery (Pet. App. F11) and allowed him to depose all of the respondents (as well as a host of others) before granting summary judgment (*id.* at F11-F12).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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NO. 83-807

In the Supreme Court of the United States

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CARL MICHAEL SEIBERT,

Petitioner,

v.

D. T. BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN SUPPORT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN SUPPORT

The respondents have misstated and berated the significance of a number of evidentiary and legal issues and their effect on the development of this case. Among their misrepresentations is the burden of proof which was improperly placed on petitioner, (hereinafter referred to as Seibert), to disprove a general claim of qualified immunity and "good faith". Seibert, while burdened with that task, was under the handicap of a *total* bar of discovery subsequent to the production of

Internal Revenue Manuals § 4585.1(2) (App. o-11), 4584.8 and 4585.2(3). (See Exhibit A). During the pendency of the depositions (which were taken and retained by Seibert's counsel), those I.R. Manuals were *not* known to Seibert or his counsel.

The significance of the I.R. Manuals as a device for verifying "good faith" cannot, and should not, be ignored in determining whether the "tax assessment" was intentionally set excessive and notice of deficiency intentionally withheld. Both acts were arranged in tandem to cognitively prevent jurisdiction and review by either Federal District Court (see *Seibert v. D.T. Baptist*, et al., No. 72-936 NE) or Tax Court (see *Seibert v. Commissioner of I.R.S.*, No. 75-1054). This intentional disregard of the Internal Revenue Manual standard was attested to by the Special Agent assigned to Seibert's case, Thomas McWhorter (Exhibit B). As Agent McWhorter explained, the reasonableness standards were ignored in pursuit of the improper program. This was the same program the respondents and their counsel *deny* existed, while at the same time, they are unable to offer "other facts" to justify their prolonged "tax assessment".[1] However, IRS Audit Agent Dudley M. Weathers attested that he reviewed the Internal Revenue Service documents and IR Manuals "which were in effect during the 1972 taxyear" and determined that "the assessment in Mr. Seibert's case was unreasonable" (Exhibit C).

As stated previously in this case, the respondents' interpretation of Seibert's claim of denial of notice of deficiency is erroneously applied to the very case law and confusion they endeavored to advance. There should be little argument that the continual seizure of property and rights thereto, without notice and hearing

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[1]Affidavit of Steven Beshears, Exhibit D, and letter from ex-prosecutor, Exhibit E.

for over three years, is fundamentally unfair, and in the absence of a "compelling State interest", it violates due process under the Fifth Amendment of the United States' Constitution.

During the decade of litigation in this case, the respondents' counsel have pointed to the conflicting case decisions (as in respondents' footnote 7) as the defense for denying notice of deficiency. As the respondents' counsel understand, they have a superior adversary position and sometimes the courts will rely on the jurisprudence they proffer. Consequently, the information (e.g., I.R. Manual) which revealed the Agency's and Agents' true understanding of issuance *vol non* of a notice of deficiency, was excluded from review of the trusting courts. The respondents' counsel has been so successful at that tactic, they have yet to abandon their pernicious paradigm. They continue by their deleterious misrepresentation of I.R. Manual § 4585.1(2) and § 4584.8. Their contention is that the "review procedure" of § 4584.8, which mandates the issues of 90-day letters, is not applicable to termination-jeopardy assessments under IRC § 6851. Their reasoning is pure demagoguery. The 90-day letter/notice of deficiency, including the computations contained therein, was an intricate part of the review procedure. Moreover, any notice which *was not specifically required* was specifically precluded by the I.R. Manual as is exemplified by Internal Revenue Manual § 4585.3(1) (App. o-14, o-15), which in substance states, no statutory notice of deficiency will be issued for the short period. That reference is specifically to the preemption of the 10-day period statutory notice of I.R.C. § 6331(a). In other words, when a statutory notice was to be withheld, the I.R. Manual would state so. When read *in parte materia*, I.R. Manual § 4585.1(2), 4584.8 and 4585.3(1) give a complete picture - one which required the 90-day letter/notice of deficiency to be

issued "within 60 days from the date of assessment."

In light of the above, the Court may ask what would be gained by excessive assessments and unissued 90-day letters (notice of deficiency). The question was answered, at least in part, by IRS Agent James Pertree's affidavit attesting to the program, which among other things, was intended to "prevent them (accused taxpayers) from making bond ... from hiring expensive attorneys..." (Exhibit F)[2].

As the previous discussion indicates, there is, and was, substantially more evidence than the mere speculation by Seibert that the actions against him were in bad faith and/or were not legitimate "good faith" revenue efforts. All evidence in this case except the self-serving general denials by the respondents points to the inescapable conclusion that both the "tax assessment" (which was without merit and ultimately withdrawn after four and one-half years) and withholding the 90-day letter (notice of deficiency) were accomplished for the intent of the improper program attested to by Agents Thomas McWhorter and James Pertree. Summary Judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles. Nor is it to be used as a substitute for trial. Consequently, the finding that, as a matter of law, pursuant to Federal Rules of Civil Procedure, Rule 56, *et. seq.*, that there exists "no genuine issue as to any material fact" was in error and contrary to the intent and spirit of F.R.C.P., Rule 56.

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[2]Moreover, in the limited trial, without counsel and against two seasoned government trial attorneys, Seibert attempted to proffer evidence of the illegal program. Although the court below cut short Seibert's proffer, it summarized the proffer of the program (TR 182-196, pertinent part, Exhibit G).

STATUTE OF LIMITATIONS

Contrary to what the respondents contend, the district court's ruling on statute of limitations is not an irrelevent issue. The district court's ruling on statute of limitations was not only erroneous, but it prejudiced the development of Seibert's case. In fact, the district court erroneously used the statute of limitations as its ground and reasoning for denying almost all Seibert's motions, granting respondents' Protective Order and for dismissal of defendants (App. d-1-23; App. e-1, App. f-2). The addition of secreted party Larry Hyatt[3] was prohibited by the district court's determination that "the complaint against the IRS Agents was not filed within one year of accrual of the claim." The lower court had determined that claim accrued on July 10, 1972 (App. d-18). This reasoning not only distinguished *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980), but also resulted in the dismissal of Frank McCammon on statute of limitations (App. e-3, see affidavit of Randy Van Nostrand, Exhibit H). Ultimately, the district court, by its order of February 10, 1982, adopted the statute of limitations to all respondents.[4]

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[3]Memorandum sent by Dwight T. Baptist, (Ex. I), in response to memo recommending the secretion of information, (Ex. J), relating to termination by Larry Hyatt, (Ex. I, J, K, L), *cf.* Privacy Act request by Seibert, (Ex. K), *cf.* affidavit of Attorney Phil Geddes, (Ex. L).

[4]With the exception of the conversion claim which Seibert, in plaintiff's Motion for Rehearing of those Matters Decided in Order of August 4, 1981, brought to the attention of the district court, the Code of Alabama § 6-2-35 (1975) had a six year Statute of Limitation on conversion. Consequently, the only claim to survive summary judgment [with proof of the program excluded from the jury's consideration (TR 182, 192, 193)] was the conversion claim against Willingham.

The statute of limitations ruling and reasoning in this case is not merely an exercise in academia, but an illogical and unfair reasoning which requires taxpayers (unable to pay assessments) to perpetually file superfluous law suits in the attempt to breach the wall of the Anti-Injunctive Statute (I.R.C. § 7421a). Should they fail, as did petitioner in *Seibert v. D.T. Baptist*, No. 72-936 NE, they are deprived a remedy for tortious conduct simply by virtue of their inability to pay the assessment and file suit earlier. In contrast, the plaintiff in *Rutherford v. Kuntz*, 702 F.2d 580 (5th Cir. 1983), was able to maintain his remedy by paying the $29,000 assessment. The statute of limitations issue is so interwoven in this case that it cannot merely be ignored and must be addressed.

BURDEN OF PROOF

Contrary to respondents' claim, they never demonstrated any specific evidence of good faith. Their only showing was self-serving statements in conjunction with convenient memories. To date, they have not produced *any* evidence supportive of their excessive and unfounded "tax assessment." Further, they have not offerred *any* evidence to minimally demonstrate that they did *any* act which was either intended to investigate and support their alleged assessment or to expedite the resolution of their claimed "deficiency."

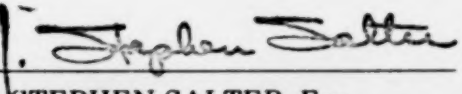
In accordance with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the burden was improperly placed on Seibert. The two protective orders granted in respondents' favor, coupled with the district court's apparent disregard for the credible evidence offered by Seibert (as hereto exhibited), make it imperitive that the Court address the issue of which party bears the burden of proof under the qualified immunity defense. Unlike the respondents

state, burden of proof is not beside the point, especially in light of the *Harlow v. Fitzgerald*[5] abandonment of the subjective prong and adoption of an objective test. The confusion surrounding the issue of the allocation of burden of proof was astutely noted by Justice Powell in *Harlow*.[6]

CONCLUSION

For the reasons stated above, the evidence in the record, and reasons set forth in the petition for a writ of certiorari, Seibert respectfully submits that a writ of certiorari should be issued to review the lower court's Opinion granting summary judgment in favor of respondents.

March 12, 1984.



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Attorney for Petitioner

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[5]Id., 73 L.Ed. 2d @ 411.

[6]Id. @ 408, n.24.

APPENDIX OF EXHIBITS

EXHIBIT A

Internal Revenue Manual: [Document MT 4500-129 (9-15-71)]: paragraph 4584.8, Immediate Review and Issuance of 90-day Letters, provides in pertinent part, that:

> (1) Immediately after assessment, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.

Internal Revenue Manual: [Document MT 4500-129 (9-15-71)]: paragraph 4585, Termination of Taxable Period under IRC 6851, provides in pertinent part, that:

> ¶ 4585.1 **Statutory Basis**
>
> (2) Assessments under IRC 6851 are not in a technical sense jeopardy assessments. Nevertheless, the review procedures in IRM 4584.8 relating to jeopardy assessments apply also to assessments under IRC 6851, except with respect to departing aliens (see IRM 4299).
>
> ¶ 4585.2 **Procedures for Terminating Taxable Period**
>
> (3) An assessment made as a result of termination of taxable period must be based on a reasonable

computation of tax liability. An assessment equal to the amount of money or other valuable property held by a person at the time of arrest is not considered a reasonable computation unless supported by other facts.

¶ 4585.3 **Assessment procedures at Termination of Taxable Period**

(1) The determined tax resulting from the IRC 6851 termination is assessed under IRC 6201 and levy action taken under IRC 6331(a) after notice and demand and if appropriate without regard to the *10 day period.* No statutory notice of deficiency will be issued for *the short period.* (emphasis added)

EXHIBIT B

STATE OF ALABAMA
COUNTY OF JEFFERSON

AFFIDAVIT

Before me, the undersigned Notary Public, personally appeared Thomas S. McWhorter, who first being by me sworn did depose and state the following:

My name is Thomas S. McWhorter. I am over the age of 21 years and a bona fide resident citizen of Homewood, Alabama. I retired from the Internal Revenue Service in January 1973. I was employed by the Internal Revenue Service in March 1946 and held the following positions for the time periods shown:

Special Agent, Intelligence Division —
(1946-1948) (1953-1973)
Zone Deputy Collector (1949-1950)
Internal Revenue Agent (1950-1952)
Inspector, I.R.S. Inspection Service
(1952-1953)

In 1972, at the direction of Group Supervisor, Intelligence Division, Larry Hyatt, I was assigned the duty of requesting jeopary (sic) assessments and termination assessments of income tax against persons arrested in drug violation cases. On July 10, 1972 I recommended the termination of a taxable year and assessment of income tax against Carl Michael Seibert of Huntsville, Alabama, in the amount of $6,458.00. The period covered by the assessment was from January 1, 1972 through July 7, 1972. This action was taken under the authority of Section 6851 of the Internal Revenue

Code...

The program consisting of the termination of taxable years involving persons arrested for alleged drug violations was mainly to cooperate with local law enforcement agencies and to assist in the drug enforcement program by seizing funds and assets belonging to violators. This was done, as I understood it from my supervisors, to dry up the drug traffic.

As I recall, during this period not too much attention was paid to Manual procedures involving drug law violators, but the main thrust was to tie up funds and assets seized.

(s) Thomas S. McWhorter

Sworn to and subscribed before me on this 13th day of July, 1981.

(s) Virginia H. Flowers

Notary Public

EXHIBIT C

STATE OF ALABAMA
COUNTY OF MADISON

AFFIDAVIT

Before the undersigned Notary Public personally appeared Dudley M. Weathers who, first being by me duly sworn, did depose and state as follows:

My name is Dudley M. Weathers. I am of legal age and a bona fide resident citizen of Huntsville, Alabama.

I was employed by the Internal Revenue Service from 1972 to 1980 during which time I held the following positions for the periods shown:

from 10-30-72 to 7-5-75	Internal Revenue Agent, National Office, Income Tax Division, Ruling Group
from 7-6-75 to 1-12-80	Internal Revenue Agent, Birmingham District, Audit Division Huntsville Audit Group

At the request of Carl Michael Seibert, I have examined a number of documents and Internal Revenue Service Manuals which were in effect during the 1972 tax year. These IR Manuals relate to the termination assessments under IR Code § 6851. I have also reviewed the letter which was apparantly (sic) sent by Larry R. Hyatt, Group Supervisor, Birmingham Group Intelligence Division, on July 10, 1972 and computation attached thereto. The letter contains no information upon which a reasonable or collectible computation could be based. In essence, the letter states that on July 7, 1972 Mr. Seibert was charged with possession of 1090 L.S.D. blotters, that an informer established that the

value of the L.S.D. was $.30 each and that it sold for $1.50 each, and that at the time of his arrest for possession of L.S.D., Mr. Seibert had $2,712.01, a 1969 Oldsmobile 442 and a bank account at Henderson Bank. Mr. Seibert's gross income for the period in question was computed to be $25,930.00 based on the information supplied by the Huntsville Police Department and an informant. Taxes in the amount of $6,458.00 were assessed by the IRS. The letter is absent any direct testimony of personal knowledge of drug sales. Absent some basis other than hearsay evidence, there is not a reasonable basis upon which any of this assessment can, or could be justified.

In reviewing the figures attached to the letter, I have determined that they are not supported by the evidence in the letter, nor would I, as a Field Agent, have calculated such an assessment. In this assessment, the Internal Revenue Service could not, by standards I am acquainted with, have prevailed in any forum absent the presence of larger unexplained assets or more evidence. Under the information presented by Mr. Hyatt's letter and values of the property as provided by IRS documents, Mr. Seibert's tax for January 1, 1972 through July 7, 1972 would have been more reasonably calculated based on the increase in net worth as follows:

$ 2,712.01	(cash)		
327.00	(blotters)	1090	LSD blotters
50.00	(guitar)	x .30	cost
550.00	(car)	$327.00	
97.67	(bank account)		
6.00	(apparently found in auto)		
$ 3,742.68	Net Worth Increase (unless otherwise demonstrated that property was acquired prior to January 1, 1972)		
255.00	Tax on the Net Worth Increase		
19.13	Self-employment tax (7.5%)		
$ 274.13	Total Tax		

Based on the information available to me, the assessment should have been computed using the above figures. It appears the assessment in Mr. Seibert's case was unreasonable.

(s) Dudley M. Weathers

Sworn to and subscribed before me this 1st day of February, 1982.

(s) Stephanie W. Tesney
Notary Public

EXHIBIT D

STATE OF ALABAMA
COUNTY OF MADISON

AFFIDAVIT

I, Steven Marlyn Beshears, having been first duly sworn, depose and say:

During the year of 1972 I worked as a paid informer for the Huntsville Police Department. I went to work for them because they were threatening to put me in prison for many years. I was to work with Narcotics Officer Gary Patterson, who was to use the cover name of Sam. Most of the time, he bought drugs from people I would introduce him to as my cousin. Gary figured out that I had been selling some of my own drugs back to the city through some people because of their ages and quantities of buys. I believe he just guessed about it, but instead of making me stop selling, he wanted to know how much money I was making. Gary told me he wanted in on it, and he started demanding some of the money which we made from selling our drugs back to him through third persons. The money we kept would be written off as spent on drugs bought in making cases against people. Some of the drugs I would buy in Atlanta, and some Gary would give me.

To set up cases, I would meet someone who smoked marijuana or did drugs. We would go out riding around and I'd tell them I needed to go make a delivery. Then on the way there I'd tell that person we were going to meet my cousin Sam, and that I owed him some money, and if they handed him some drugs he would just take them for the money I owed him. It was easy because young people wanted to be drug dealers because it made them kind of a hero and their friends thought they were cool. An example of two of those people I can thing of offhand are

Ted Easley and Richard Shackleford.

I first met Mike Seibert at an outdoor concert at Monte Sano State Park where he and some other people were playing frisbee. We started talking and playing frisbee together. After that I learned where he lived and came by his house on Westwood Drive a couple of times where we played more frisbee. Mike also visited me at my place a few times.

Gary started pressuring me to come up with someone believably a big drug dealer so we could account for all the money which was being spent on drug buys, saying he would see me back in jail if I didn't. I would report to him on my progress of hunting for someone.

On July 5, 1972, I came by Mike's house to see him. I had arranged with Gary to meet him at the Cotton Club parking lot and I would try to get Mike to come with me. When I got to Mike's house, he had been doing yard work, and I asked him if he wanted to ride over and meet my cousin, Sam. He said he could use a break, so he agreed. On the way over to meet "Sam," I explained that Sam was from Mobile and they were a little dry on drugs, and that I had some drugs I wanted to sell Sam, but I was in debt to him. Although I planned to pay him later, if he knew they were my drugs, he would just take them because I could not afford to pay him back right now. I asked Mike if he would just hand them over to Sam. Mike said he'd think about it, but he did not seem to like the idea. When we got to the parking lot, Sam (Gary) was there waiting for me. On the way to Gary's car, Mike told me he did not want to hand him the drugs. So instead of Mike giving the drugs to Gary, I believe I gave Ted Easley a lesser amount to give Gary. I think this was one of the times Ted handed drugs to Gary, because I had made some cases on Ted this way. Mike did not talk to Gary very much. He just seemed to be thinking about what was going on.

When we left Sam's (Gary's) car, Mike somehow had figured out the whole thing we had going. He told me he believed I was an informer and that my cousin was a narcotics agent. He asked Ted if he had ever handed any drugs over to that guy. Ted said he had, but he had not been arrested for anything. Then Mike said he believed Ted might (be) in trouble. I tried to convince Mike he was wrong, but I did not believe I was successful. After I dropped Ted off, I called Gary and told him Mike thought he was a narc. Gary told me he knew Mike a long time ago, and he really wanted to bust him because he did not like him and we needed to keep quiet by putting him in jail.

Mike had told me earlier he had planned to go out of town that Friday, which was the 7th of July, so I told Gary we needed to get him soon or we might lose our chance. I tried a couple of times to get in touch with Mike on that Friday, but I was having trouble catching him in. Finally about 5:00 P.M., I came by with Tonya Stearns, my girl friend, and he was home. I carried an envelope of L.S.D. in to his house with me. He did not seem very happy to see me. When he answered the door, I asked if I could come in and he said yes. When I came inside he appeared to be getting ready to take a bath. I walked into his room and he left me standing there while he was in the bathroom. I only had a chance to plant one paper strip with the blotches of L.S.D. on it in his room on his dresser before he came back in from the bathroom. When he came back, I asked him if he would go with me to see my cousin and let him convince him that he was not a narc, but Mike refused, saying he was getting ready to leave town. Mike walked me to the edge of his living room where I asked him for an envelope. He gave me a Blue one from a box on top of a bookcase. He did not see me as I left. When I walked out, the passengers window of his 442 was rolled down. I kept 5

strips in the envelope I had, and put 5 strips in the blue one he gave me. I put them both in the front seat of his car under a white bag that was in the front seat with some other papers. Then Tonya and I left. We drove around the block to see if the police were there yet. When we saw them Tonya thought we were going to be busted, but I told her not to worry. I went to the phone and called Gary and told him it had been done.

Gary was pleased with the way things had gone in setting up Mike, so he gave me a larger amount of money than I got for any other case. Then for some reason Gary started telling the people that I busted, and even some people I had not busted, that I was the informer in their case. Apparently he was trying to get me hurt or killed, I believe in order to keep me from telling about what we were doing. After some of what I did came out, the police harassed me, stopping me all the time.

I regret what I have done to some of those people who were my friends, and I am still not sure what made me do it. I guess fear of what would happen to me if I did not work with the narcotics squad, and money, are what made me not stop before I hurt so many people who were just growing up. I wish nothing more than to try to explain what was happening during the time I was an informer, and especially in Mike Seibert's case because he was probably hurt more than most of the others. I had not bought drugs from him, and no one from the I.R.S. ever asked me about buying any from him, nor did I go to them and tell them I bought drugs from Mike Seibert.

(s) Steven Beshears

Sworn to and subscribed before me this 8th day of July, 1981.

(s) Mary Ellen Kelley
Notary Public

EXHIBIT E

CITY OF HUNTSVILLE
Governed by Mayor and City Council
P.O. Box 308
Huntsville, Alabama 35804
★
Phone: 532-7301

Charles H. Younger
City Attorney
E. Cantey Cooper
Asst. City Attorney
Roy W. Miller
Asst. City Attorney

November 18, 1981

Ms. Norma Jean Robbins
Admissions Secretary
Alabama State Bar
415 Dexter Avenue
P.O. Box 671
Montgomery, Alabama 36101

Dear Ms. Robbins:

During the years of 1972 to 1979 I prosecuted criminal cases for the Madison County District Attorney's Office. Sometime during the scope of my employment there I was assigned a felony case to try against Carl Michael Seibert. After I received the case I interviewed witnesses and worked the case up for possible prosecution. After doing so I made the determination that there was no merit to the prosecution of said case. A request was made by myself to the Distric Attorney to reassign the

case to someone else for them to make an impartial and separate consideration. Without rechecking with the District Attorney's Office to see the outcome, it is my recall that said case was, in fact, dismissed after review by another member of their staff.

After the dismissal and for some three to five years thereafter, I got to know Carl Michael Seibert on a social basis. He highly impressed me as a very intelligent, industrious, and capable individual. It is my opinion that he would make an excellent attorney and should be given all consideration directed toward that end result. Therefore, I respectfully submit that if possible you certify him as a law student in good standing.

Sincerely yours,
(s) Roy Wesley Miller
Roy Wesley Miller

RWM/bab

EXHIBIT F

STATE OF ALABAMA
COUNTY OF MONTGOMERY

AFFIDAVIT

I, James Pertree, after being first duly sworn, do depose and say the following:

In the early 1970's the Internal Revenue Service came out with a program to get money out of drug seller's hands. The main effect of this program was to stop them from buying more drugs, to prevent them from making bond when arrested and from hiring expensive attorneys. Agents and Special Agents of the Internal Revenue Service were selected in Huntsville, Birmingham, Montgomery and Mobile, Alabama to be on a standby basis night and day for a call from a police department that had made an arrest for the sale of drugs. I was called down to the Montgomery City Police Department about 10 times. On each case, an undercover policeman had bought some type of illegal drugs. When I arrived at the police department, the money would be on a table and the drug seller was in the County Jail. I would talk to the undercover policeman who bought the drugs. From that information received pertaining to the drug seller, I made a computation of income tax plus penalty and self-employment tax that would at least equal the cash on the table. As an audit agent, I wrote a report and then either I or a Special Agent would call a Collection Officer and he and I went and talked to the drug seller while he was still in jail. I would talk to him to get any information pertaining to his drug selling and/or his net worth. I would tell the drug salesman he owed "X" number of dollars of tax and would explain to him what I did and ask him if he

wanted to pay the tax. They always said "No". The Collection Officer would then serve a lien on the taxpayer and city for all the money on the table and his car. I had 24 hours to get my case to Birmingham to the District Director who had been called before each of my assessments.

The policy of this program was set by the District Director, Dwight T. Baptist, and was communicated within the Internal Revenue Service by every way possible — oral and written, from many people. I do not have any of those memos because when an agent retired, as I did in May of 1980 (after 32 years of service), he is supposed to leave that material with the IRS.

I have reviewed the letter of July 10, 1972 by Larry Hyatt which recommends termination of Carl Michael Seibert's 1972 tax year. I have never seen any termination assessment made when there were no sales charges against the taxpayer or a police officer could not personally attest to sales by that person. I would not have made a termination in Mr. Seibert's case unless the police officer could have provided more than what appeared to be hearsay. I would have asked to talk to someone who personally knew of drug sales.

(s) James Pertree

Sworn to and subscribed before me this 27th day of January, 1982.

(s) Margaret G. Moch
Notary Public

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CARL MICHAEL SEIBERT,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
vs.	)	NO. 77-PT-0951 NE
	)	
LEE WILLINGHAM,	)	
Internal Revenue Officer,	)	
	)	
Defendant.	)	

TR 179 Thomas McWhorter called on behalf of plaintiff, having first been duly sworn was examined and testified as follows:

TR 180 Q. During the course of your employment and more specifically in July of – July 10 of 1972 did you have an occasion to be involved in my case?

A. Well, I was involved in a lot of cases. I assume yours was one of them.

Q. I would like to show this to you. Let me go ahead and enter it --

TR 181 Q. Mr. McWhorter, is that you signature down there, sir?

A. Yes.

Q. Do you remember anything -- well, let me ask you this. Are you familiar with six thousand four hundred fifty-eight dollars here?

A. Yes.

Q. Can you tell me if there was a program during this period of time –

MR. KELLAR: Objection, Your Honor.

THE COURT: Sustained.

TR 182 ...

Q. Was the action taken in my case for revenue purposes?

MR. KELLAR: Objection.

THE COURT: Sustained.

MR. SEIBERT: Your Honor, may I proffer Mr. McWhorter's testimony for the record outside the presence of the jury?

THE COURT: All right. Ladies and gentlemen, you will be excused. Remember my previous instructions and don't discuss or comment on the case. If you will remain out in the hall for about five minutes, please.

(In open court, jury not present.)

Q. Mr. McWhorter, you were the agent that was assigned the agent of the originator in this case; is that right?

A. That's right.

TR 183 Q. During this period of time, was there a program for using the Internal Revenue Service for some other reason than revenue?

A. There was a program about this time that the Internal Revenue Service was assisting the local law enforcement authorities, State and City, in attempting to dry up the drug traffic.

Q. Yes, sir.

A. By seizing whatever funds that the drug sellers had or other assets that they had.

Q. Did collection officers as a general rule have knowledge of that program?

MR. KELLAR: Object to that, Your Honor.

THE COURT: Well, this is a proffer.

MR. KELLAR: Well, that's true. I'm sorry.

A. To my knowledge, the collection officers did have a general knowledge of the program, certain of the officers were assigned to this program.

Q. Do you remember at all how the procedure worked or the program worked?

A. Well, the collection officers were usually called in on a case where local law – the police would seize funds from drug sellers and they would – the collection officers would go through a termination of a taxable year of the
TR 184 drug seller and try to tie – try to assess all the tax against what they had seized.

...

Q. Is that a proper function of the Internal
TR 185 Revenue Service, civil powers of seizure?

MR. KELLAR: Objection.

THE COURT: Sustained – well, go ahead and proffer it.

...

A. Would you ask that again, please?

Q. Yes, sir. The Internal Revenue Service has vested in it incredible seizure powers, more than any other agency in the United States. These powers, would you say, are granted for the sole purpose of revenue?

A. I would say so, yes.

Q. Would a use of that, any improper or any other use of it, other than for revenue purpose be an abuse of that trusted authority?

A. Yes, I think it would be an abuse. My opinion, it would be an abuse.

Q. That's based on being with the Internal Revenue Service from 1946 to 1973?

A. Yes.

...

TR 186 THE COURT: Mr. McWhorter, are you the agent that made the initial recommendation that Mr. Seibert's tax year be terminated?

THE WITNESS: Yes, sir.

THE COURT: Did Mr. Willingham here have anything to do with that determination being made?

THE WITNESS: I don't recall, Your Honor,
TR 187 whether Mr. Willingham was the officer on the case or not.

THE COURT: Well, do you recall that he did have any role in making the decision as to whether the termination was to be made?

THE WITNESS: I really don't know.

THE COURT: What was your capacity, were you a Special Agent or Revenue Agent?

THE WITNESS: I was a Special Agent at the time, yes, sir.

THE COURT: As a general rule, did a Revenue Agent have any role in making the decision as to whether or not someone's tax year should be terminated?

THE WITNESS: Yes, sir.

THE COURT: Other than calculating tax?

THE WITNESS: Yes, sir. They computed the tax.

THE COURT: Well, I know it. That's what I say, other than calculating the tax, did they have anything to do with making a decision as to whether or not the tax year should be terminated?

THE WITNESS: They recommended that the tax year be terminated, yes, sir.

THE COURT: Is there anything in the file that you are aware of that would indicate that Mr.
TR 188 Willingham had anything to do with the decision as to whether or not the tax year was to be terminated or anything to do with calculating the tax that was said to be due?

THE WITNESS: Not to my knowledge. I don't know who – the figures and recommendations came to me in this case through Group Supervisor Larry Hyatt, who was Group Supervisor in the Intelligence Division.

THE COURT: Didn't you make the initial recommendation to Mr. Hyatt?

THE WITNESS: No, Mr. Hyatt made it to me and I did the paperwork on it.

THE COURT: I recall seeing a form on which it indicated that you made the recommendation and that Mr. Hyatt then approved it; is that not correct?

MR. SEIBERT: That's the way it looks.

THE WITNESS: Yes, that's the – on this form here -- I had -- I made the original recommendation as the originator.

THE COURT: Yes, sir.

TR 189 ...

BY MR. SEIBERT:

Q. Would you say, Mr. McWhorter, that based on the computation, the letter from Larry Hyatt, that this was a – and based on the information contained in there, that this was a reasonable or good faith assessment?

A. Well, I don't know whether it was a good faith assessment, but it was probably all he
TR 190 had to go on.

Q. Was it enough to go on?

A. Well, I couldn't swear to that, whether it was enough. As I said before, they usually made these assessments to cover the value of the assets seized.

Q. If the value -- well, let me get the manual on that period, if you don't mind. Do you remember any time reviewing the manual procedure at some points -- subsequent to our conversation the first time I came to see you -- specifically under I.R. Manual Procedure 4585.2, that a termination of taxable year and assessment must be used sparingly and care taken to avoid assessing an unreasonable assessment. They should be limited to the amount which reasonably can be expected to equal the ultimate tax liability for terminated period. Therefore, termination of taxable year and assessment must be personally approved by the District Director.

Now, by that, was the District Director obligated to make sure the assessment was reasonable?

A. Well, he was responsible for seeing it was reasonable, yes.

...

TR 191 THE COURT: Well, let me ask Mr. McWhorter this. Mr. McWhorter, do you recognize the distinction between a Revenue Agent and Revenue Officer?

THE WITNESS: Yes, sir.

THE COURT: Or is there one?

THE WITNESS: Yes, sir.

THE COURT: What is the distinction?

THE WITNESS: A Revenue Officer is resposible for collecting funds, collecting back taxes and also any funds that are due on an
TR 192 assessment.

THE COURT: Does a Revenue Officer play any role in determining initially whether or not an assessment is to be made?

THE WITNESS: Generally not. They may have been in this case, in this program. Generally he is given what they call a warrant for restraint of taxes and he goes out and makes his collection based on –

TR 193 ...

THE COURT (Addressing Mr. Seibert): Well, I'm not going to allow you just – you know, I don't see that there is any relevance and if I am in error in shortcutting your proffer, I'm in error of that. In absence of some sort of an indication that this Defendant Willingham was doing something other than just making a collection, I don't see that it's appropriate to take any further time in establishing that somewhere down at the end of the trail of some sort of abusive program that the IRS may or may not have adopted, that a Revenue Officer

who was out in the process of collecting accounts is chargeable with the reasponsibility growing out of any such program, if any. I think that it perhaps is just going to take time with the jury being out and waste time in going into that any further. In
TR 194 the absence of some indication that you can show me that he was involved in making that decision initially.

Now, the question of the disposition of the property after he obtained it is a matter that is still before the Court, of course. But I don't want to take any more time with this part of it.

MR. SEIBERT: Yes, sir, I appreciate the Court's patience. I understand that. The only thing that I could even offer is the fact that the assessment was so unreasonable and that he knew or should have known and probably did know of the program.

THE COURT: Well, I don't know that he had any discretion with regard to it. But at any rate, let me say this. The Court understands that you are proffering, or would proffer, if given the opportunity, evidence that there was some sort of program whereby the Internal Revenue Service had undertaken either for a purpose not related to the collection of revenues, attempt to financially embarrass in some way, people who were allegedly involved in drug traficking. (sic)

MR. SEIBERT: Yes, sir.

THE COURT: Or that concomitant with the

possibility of collecting revenues that they
TR 195 were so involved. To the extent that you are making such a proffer, you have that proffer as far as the Court is concerned. But in the absence of some sort of indication that this Defendant Willingham was anything other than someone who ultimately was charged with basically what is an administerial act of collecting it itself, I don't see any need in taking any more time.

MR. SEIBERT: Yes, I understand. The only thing I was going to say is that the other defendants that have been have been dismissed, that those people that -- and the party that was not allowed to be added, did have knowledge of this. In fact, Larry Hyatt is the one that relayed to Mr. McWhorter this information.

THE COURT: All right. Okay. Of course, if there is error in whatever the Court's ruling in that regard is concerned, that error is already there and I doubt that it would either be resurrected or changed by virtue of what takes place here. That area is fixed, if there is any -- all right. Do you need to ask him any questions?

MR. KELLAR: No, Your Honor, not in light of -- is Mr. Seibert going to offer any more in evidence to the jury with this witness?

THE COURT: anything else to the jury other
TR 196 than what you have proffered now?

MR. SEIBERT: No, sir.

THE COURT: Do you have any questions of this witness for the jury?

MR. KELLAR: No, sir.

THE COURT: All right. You can step down and you are excused.

(Witness excused).

EXHIBIT H

STATE OF ALABAMA
COUNTY OF MADISON

AFFIDAVIT

I, Randy Lewis Van Nostrand, after being first duly sworn, depose and say:

I came to know Mike Seibert in the early 1970's because his case was similar to that of other people I knew who had been set-up or entrapped by police informants using illegal means. Mike came to me with some evidence that he had which supported his claim that he had been set-up by Steve Beshears, a person of questionable character. Mike explained to me that Beshears was the only source of information the Internal Revenue Service had for their tax case against him and that if he could get the IRS to examine their own case, they would have to stop hounding and worrying him. He further stated that he had tried to get the courts to review the tax case, but they would not allow him to find out any information about the IRS claim or give them any of his evidence. He said he had tried to get Internal Revenue Service agents in the Collections and Audit Divisions to take his evidence, but they refused, referring him to the Criminal Intelligence Division. Mike further explained to me that some IRS agents told him about a program to use the IRS to assist local police in getting convictios and harassing those arrested by forcing them into paying for tax litigation. He claimed they lacked proper motive for their acts and there was a conspiray between those making the claim of tax and the local police.

The things Mike showed me convinced me that he was right, that the Internal Revenue Service had abused him

and taken his property without cause. I was motivated to accompany him with his allegations to the Internal Revenue Service where we tried to speak to an agent. The purpose of the trip there, as he explained it to me, was to explain to the IRS about the set-up and Steve Beshears' importance in the IRS claim against him, and Mike hoped that this would force them to examine their case against him, and end what he claimed was a conspiracy. He thought that if they would not end it, they could not later claim they did not know about his claim of a conspiracy. Mike asked me to accompany him so as to verify at a later date that he had gone to see the IRS and why he went.

When we arrived at the Internal Revenue Service office, I met the IRS Agent, Frank McCammon, but was not permitted to accompany the two of them into an adjoining room where Mike was supposed to go with his briefcase and show him the substantiating evidence which he had previously shown me, and which as stated above, he felt would prove to them that he had been wronged. I remember Mike leaving that day angry because the agent refusd to take any of the evidence.

(s) Randy Lewis Van Nostrand

Sworn to and subscribed before me, this 29th day of January, 1982.

(s) Beth Abrams
Notary Public

EXHIBIT I

October 21, 1975

Chief, Disclosure Staff
National Office CP:D

District Director
Birmingham District

Freedom of Information Request -
Re: Carl Michael Seibert (75-1054)

This acknowledges your memorandum of October 14, 1975.

The administrative file including the documents requested by Mr. Geddes is located in the Office of Regional Counsel, Room 1624, 2121 Building, 8th Avenue North, Birmingham, Alabama 35203.

On October 20, 1975, Mr. Seibert requested the Tax Court to furnish affidavits from Huntsville police officers and a bill of sale for a Martin D-35 Guitar. A copy of this request is enclosed. The request was received by Mr. Robert W. West, attorney in the Office of Reginal. The documents furnished to Mr. Seibert are included in the enclosures to this memorandum.

Also enclosed are copies of Form 2644, Recommendation of a Termination Assessment, for Mr. Seibert for the period January 1, 1972 through July 7, 1972. This is one of the reports prepared in connection with the examination. We do not recommend that this document and the attachments to this document be furnished to the requester.

We will await your response before contacting Mr. Geddes regarding his request for inspection of the records.

Dwight T. Baptist

Enclosures

cc: Public Affairs Officer
Southeast Region

EXHIBIT J

date: Oct. 14, 1975

to: District Director, Birmingham
Attention: Ed Bryla

from: Chief, Disclosure Staff CP:D
National Office

subject: FOIA request re Carl Michael Seibert (75-1054)

Attached is a copy of an FOIA request submitted by Mr. Philip A. Geddes for documents pertaining to his client's 1972 tax return.

Please conduct a search for the requested documents and forward to us two copies of those documents on which you have disclosure questions. Also include your disclosure recommendations for each.

Contrary to what you were previously informed about inspection procedures, please await our response before contacting Mr. Geddes to arrange a mutually convenient time for inspection.

If you have any questions, please contact Mr. Halbach at (202) 964-4912.

(s) Charles A. Gibb

Attachment

EXHIBIT K

TAXPAYER ASSURANCE TELEPHONE "CALL BACK" MESSAGE	NOTE: Use this form only when inquiry cannot be answered with reasonable promptness.

1. Disposition	2. Call received by:	
☐ (Retain) Research and Call Back ☐ To Supervisor ☒ To: Mr. Bryla	T. James	
	3. Date 10-15-75	4. Time 10:40 P.M.

Please return taxpayer's call direct. Destroy this form immediately after satisfying inquiry.

5. Name of caller	6. Phone number to call
Carl M. Seibert — Huntsville	852-3592

7. Unanswered question

Re: Delay in his request for information under Privacy Act. Requested info some 4 mos. ago. Needs info to go to Court.

EXHIBIT L

STATE OF ALABAMA
COURT OF MADISON

AFFIDAVIT

Before me, Philip A. Geddes did personally appear and after being duly sworn by me, did depose and say as follows:

1. My name is Philip A. Geddes and I am an attorney in Huntsville, Alabama.

2. On June 19, 1975, I submitted a Freedom of Information Act request for Mike Seibert. As best I can recall, I received a request from the IRS Disclosure Office for a power of attorney form which I returned to them. I then received a form letter requesting additional time to comply with my request. The final letter which I received in November, 1975, stated, in substance, that they were unable to locate the file requested.

3. To my knowledge, no part of Mike Siebert's (sic) file was made available for his or my inspection under my request.

(s) Philip A. Geddes

Sworn to and subscribed before me this the 30th day of June, 1981.

(s) Elizabeth Price Moore
Notary Public

END OF DOCKET